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No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

NICHOLAS E. BRUSCO,

Petitioner,

vs.

STATE OF NEW YORK
DIVISION OF HOUSING & COMMUNITY RENEWAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the provisions of the Rent Stabilization Law of the City of New York which fix the amount of rent that may be charged on a vacant apartment violate the guarantee of the Fifth Amendment of the United States Constitution against the taking of private property for public use without just compensation because such provisions do not substantially advance any legitimate state interest ?

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OPINIONS BELOW [1]

The order of the Rent Administrator of respondent finding a "rent overcharge" and directing petitioner to pay money appears as Appendix E. The order of the Commissioner of respondent, denying petitioner's appeal and affirming the Rent Administrator's order, appears as Appendix D. The opinion of the New York Supreme Court, on appeal by petitioner, appears as Exhibit C.

The opinion of the New York Appellate Division, First

[1] The opinions below are not reported in any of the official reporters.

Department, upon petitioner's further appeal, appears herein as Appendix B.

The New York Court of Appeals dismissed petitioner's final appeal on April 4, 1991. The opinion of the Court of Appeals appears herein as Exhibit A.

JURISDICTION

Petitioner seeks a writ of certiori to review the decision of the New York Court of Appeals rendered on April 4, 1991. This Court has jurisdiction of this matter pursuant to Rule 10.1(c) of the Rules of the Supreme Court of the United States. This Court's jurisdiction rests in the Fifth Amendment of the United States Constitution wherein it is stated that no "private property be taken for public use, without just compensation."

STATUTORY PROVISIONS, RULES AND REGULATIONS INVOLVED [2]

1. Code of the Real Estate Industry Stabilization Association of New York City, Inc., sections 10B, 20A and 42A(2).
2. The Rent Stabilization Code of 1987, sections 2521.1 et. seq. [3]
3. Rent Guidelines Board Order Nos. 11 through 22. [4]
4. New York City Admin. Code, sec. 26-501 (1974) (legislative findings).

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[2] The pertinent portions of these provisions are set forth in Appendix F.

[3] The Rent Stabilization Code is found in the Administrative Code of the City of New York, sec. 26-501 et. seq.

[4] Vacancy increase portions only.

STATEMENT OF THE CASE

Petitioner challenges those provisions of New York City's Rent Stabilization Law[5] (the "challenged provisions") which fix the amount of rent which may be charged to an incoming tenant on a vacant unit ("vacancy increases"). Petitioner in no way challenges the validity of the Rent Stabilization Law as a whole.

Petitioner is the owner of a building located at 118 West 69th Street in New York City. There are ten apartments in this building. The apartments are subject to New York City's rent control[6] and rent stabilization laws.[7] When petitioner purchased the subject building on May 29, 1980, Walter Orzel (the "complainant") was in occupancy of the subject apartment, #1B. The complainant had entered into possession of the subject apartment by written lease dated July 11, 1979 with the previous owner for a monthly rent of $ 425.00.

On or about February 10, 1984, the complainant filed a complaint with respondent alleging that he had been overcharged in his rent. On August 12, 1986, the respondent issued its order ("overcharge order") finding that the complainant's initial rent in

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[5] These provisions are the Code of the Rent Stabilization Association of New York City, Inc., sections 10B, 20A and 42A(2), The Rent Stabilization Code of 1987, sections 2521.1 et. seq. and Rent Guidelines Board Order Nos. 11 through 22, only insofar as they fix percentage increases on vacant apartments.

[6] Title 26-401 et. seq. of the Administrative Code of the City of New York (formerly Title Y51-1.0 et. seq.)(commonly referred to as "Rent Control" or "City Rent Law").

[7] Title 26-501 et. seq. of the Administrative Code of the City of New York (formerly Title YY51-1.0 et. seq.).

July, 1979 should have been $ 374.45, rather than $ 425.00. The overcharge order directed petitioner to pay to the complainant all of the alleged overcharged rent collected by petitioner and the previous owner to the date of the complaint in the amount of $ 5,810.03, and reduced the complainant's rent prospectively in accordance with its findings.

Upon the filing of the complaint herein, respondent demanded that petitioner produce the rental records on the subject apartment back to the "base rent date." Petitioner received no records for the subject apartment from the previous owner other than those relating to the complainant's tenancy. The respondent found a "rent overcharge" by applying its "default rent computation" method, whereby the complainant's initial lease rent was lowered by the percentage of the guidelines increase and the vacancy increase in effect at that time.

Petitioner first raised its constitutional argument that the respondent's order constituted a taking of property in violation of the Fifth Amendment on the administrative level. On page D-3[8] of respondent's order denying petitioner's administrative review, the Commissioner of the Division of Housing & Community Renewal stated: "Subsequently, the owner submitted a supplement to his Petition stating in substance that the Rent Stabilization Law as applicable to this case is unconstitutional." The respondent stated nothing further with regard to petitioner's claim.

Petitioner filed in New York Supreme Court a petition for review of the Commissioner's Order arguing, inter alia, that the overcharge order constituted a taking of petitioner's property

[8] References to the appendix are made by denoting the letter of the appendix followed by the page number (eg.: D-3 denotes page three of appendix D).

in violation of the Fifth Amendment. The New York Supreme Court denied the petition. [9]

Petitioner then appealed to the New York Appellate Division, First Department, arguing primarily its taking claim. The Appellate Division held, without more, that "petitioner has failed to rebut the presumption of constitutionality of the Rent Stabilization Code by proof beyond a reasonable doubt as it relates to the imposition of a rent ceiling on vacant apartments. (See, Hotel Dorset Co. v. Trust For Cultural Resources, 46 NY2d 358, 370.)."[10]

In appealing to the New York Court of Appeals, petitioner argued only the takings claim. Although pursuant to the New York State Constitution[11] and New York statutory law,[12] jurisdiction of such an appeal is as of right, the Court declined jurisdiction.[13]

New York City's rent regulated apartments fall into two systems of regulation (collectively referred to as "rent regulation"): rent control and rent stabilization. Apartments which are not rent regulated are commonly referred to as "decontrolled." Rent control is an older system and rent controlled tenants do not have current leases as their tenancies have been extended by statute. The respondent is charged with the responsibility of overseeing both systems.

Rent regulation has three important aspects. First, is that the tenant in occupancy is guaranteed a lease renewal. Second, the increases upon lease renewal are prescribed by statute. Third,

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[9] See Appendix C.

[10] See Appendix B.

[11] Article 6, section 3(b)(1).

[12] N.Y. Civ. P. Law & Rules 5601(b)(1).

[13] See Appendix E.

and the only aspect of rent stabilization law which is challenged by petitioner, is that the amount of rent which can be charged to a new tenant is limited to a percentage increase of the amount of rent that the previous tenant was paying for the apartment.

The mechanism for increasing rents on each of the two classes of rent regulated apartments is quite different. Increases on rent controlled apartments must be applied for by owners bi-annually, and if granted may be as much as 7.5% per year. The increases on rent stabilized apartments are determined annually by a Rent Guidelines Board, which determines an increase for a one year and two year lease renewal, as well as the "vacancy increase." Upon the expiration of the rent stabilized tenant's lease, he or she can choose a one or two year renewal lease at the guidelines increase in effect at that time.

The vacancy increase limits the amount of rent collectible on a vacant rent stabilized apartment. For an apartment which was previously rent stabilized, the vacancy increase is a flat percentage which changes every year and has varied from zero to 15% over the last ten years.

For an apartment which was previously rent controlled, an owner may rent the apartment at the "fair market rent." However, the new tenant is entitled to receive a written notice (the "Notice") advising of his or her right to challenge the rent agreed upon as excessive of fair market. Upon such a challenge filed with the respondent within 90 days of the tenant's receipt of the Notice, the respondent will proceed to determine the "fair market rent." If the owner cannot show by proof of service that the tenant was served with the Notice more than 90 days before the date of the tenant's filing of the challenge, the respondent will proceed to determine the fair market rent. The Rent Stabilization Law in effect in February, 1984, the date complainant filed his

complaint, required owners to maintain rental records, including proof of service of the Notice, for as far back as 1968.

The respondent determines "fair market rent" by taking the average of two numbers. The first number is the previous rent controlled tenant's rent multiplied by a "fair market rent guideline," which is determined every year by the rent guidelines board. The second number is the rent which the owner can show to be market rent by providing actual examples of rents on comparable apartments in the area at the time of the commencement of the complaining tenant's lease.

For an apartment which was previously rent stabilized, an owner may not rent that apartment for more than the prior rent plus the applicable vacancy increase in effect at that time. The vacancy increase is determined annually by the Rent Guidelines Board.

In this case, it is unknown whether the tenancy prior to the complainant's was rent controlled or rent stabilized, thus respondent used its "default method" in its overcharge order. Petitioner could not produce either the previous leases or proof of service of the Notice. Petitioner argues that whether the prior tenancy was rent controlled or rent stabilized is irrelevant because the provisions governing vacancy increases, upon which the overcharge order is based, constitute a taking of petitioner's property in violation of the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

POINT I
THE RESPONDENT AND THE NEW YORK STATE COURTS HAVE DISREGARDED THE CONSTITUTIONAL QUESTION PRESENTED

This Court has held that the state may use its police power, to effect what would otherwise be an unconstitutional taking, on condition that its actions substantially advance a legitimate state interest.[14] The question in this case is whether the challenged provisions substantially advance legitimate state interests providing the constitutional justification for the state to use its police power to regulate petitioner's property as provided in the overcharge order.

On the administrative level, the Commissioner acknowledged, but did not otherwise address petitioner's taking claim. The New York Supreme Court dismissed petitioner's constitutional challenge relying on Benson v. Beame[15] and Pennell v. City of San Jose,[16] each of which was dismissed for lack of jurisdiction.

The constitutional attack in Benson was a facial one. In Benson, the plaintiffs launched a general attack against the rent

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[14] Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-41, 97 L.Ed.2d 677, 687-92 (1987); Agins v. Tiburon, 447 U.S. 255, 260, 65 L.Ed.2d 106, 112 (1980); Penn Central Transportation Co. v. New York City Landmarks Preservation, 438 U.S. 104, 138, 57 L.Ed.2d 631, 657 (1978).

[15] 50 N.Y.2d 994, 431 N.Y.S.2d 475 (1980).

[16] 485 U.S. 1, 99 L.Ed. 2d 1 (1988).

control laws based on the proposition that, after 36 years, there was no longer an emergency justifying the State's use of its police power. The case was dismissed because the plaintiff did not lay before the court a specific set of facts upon which the constitutional analysis must necessarily be made. The Court of Appeals stated:

> On the question of unconstitutional taking it need only be noted that plaintiffs' papers contain only generalized conclusions which... do not establish that the property of any individual property owner has been "taken"....[17]

Thus, the court in Benson dismissed the plaintiff's action not because it found the rent control laws to be constitutional, but because it was presented only with a facial constitutional attack upon which it could not make the necessary constitutional analysis for decision.

Likewise, the plaintiff in Pennell lacked standing to assert its facial Fifth Amendment claim. In this regard the Court stated:

> [A]t no time did appellants allege that either Pennell or any member of the Association has "hardship tenants" who might trigger the Ordinance's hearing process, nor did they specifically allege that they have been or will be aggrieved by the determination of a Hearing Officer that a certain proposed rent increase is unreasonable on the ground of tenant hardship.[18]

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[17] 50 N.Y.2d at 996, 431 N.Y.S.2d at 476.

[18] 485 U.S. at 6, 99 L.Ed.2d at 11.

Indeed, the Court stated that rent regulation can be considered only in the context of "an actual factual setting that makes such a decision necessary"[19] and that "it would be premature to consider this contention on the present record."[20] Petitioner has standing to demonstrate the constitutional invalidity of the rent ceiling provisions fixing percentage increases on vacant apartments as applied to the subject premises in this case and the Court is presented with a controversey ripe for its review.

Further, the California statute challenged in Pennell was designed to protect tenants in occupancy from rent increases, wherein the state's legitimate interest in preventing the displacement of indigent tenants could be substantially advanced. In the case at bar, respondent has not been required to show how any state interest is advanced by the challenged provisions, which impose rent ceilings on vacant apartments and have no bearing on any tenants in occupancy. Thus, the New York Supreme Court's reliance on Pennell was superficial and misplaced.

The Appellate Division, First Department failed to apply the correct constitutional test to petitioner's claim in holding that petitioner had "failed to rebut the presumption of constitutionality of the Rent Stabilization Code by proof beyond a reasonable doubt as it relates to the imposition of a rent ceiling on vacant apartments. (See, Hotel Dorset Co. v. Trust For Cultural Resources, 46 NY2d 358, 370.)." No decision of this Court has ever held that in order for a Fifth Amendment takings claim to be sustained, the statute must proven unconstitutional beyond a

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[19] 485 U.S at 10, 99 L.Ed.2d at 13 (citing, Hodel v. Virginia Surface Mining & Reclamation Assoc. Inc., 452 U.S. 264, 294-95, 69 L.Ed.2d 1, 28 (1981)).

[20] 485 U.S. at 9, 99 L.Ed.2d at 13.

reasonable doubt.

The New York Court of Appeals declined jurisdiction of the appeal on the ground that "no substantial constitutional question is directly involved."

Thus, petitioner has exhausted New York State's entire appellate process without the benefit of the judicial scrutiny mandated by this Court.

POINT II

RESPONDENT HAS AN AFFIRMATIVE OBLIGATION TO SHOW HOW THE CHALLENGED PROVISIONS SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST

A. Respondent Has Not Attempted To Show Any Purpose of the Challenged Provisions

Petitioner in no way challenges rent regulations as a whole -- only those provisions which limit vacancy increases. Despite petitioner's constitutional challenge, respondent has never put forth any purposes for the challenged provisions. Rather, respondent has relied upon a presumption that the long-enacted provisions are constitutional. Although the challenged provisions may be presumed constitutional, once challenged on the ground that they do not substantially advance a legitimate state interest, it is incumbent upon the respondent to show the nexus between the legislation and such purpose.[21]

This Court has long held that a regulation which impairs an owner's constitutionally guaranteed property rights is not valid if it does not substantially advance a legitimate state interest.[22]

In Nollan, this Court held that a California statute allowing a beachfront property owner a building permit on condition that he grant a public easement along the beach effected a taking because there was a lack of a nexus between the burden placed on the property owner -- forcing a public easement on private property, and the original purpose of the legislation -- protecting beach visibility and preventing congestion on public beaches. This Court stated:

> We view the Fifth Amendment clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest.[23]

Further, the decision in Nollan rested upon the lack of

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[21] Nollan, 485 U.S. at 836-42, 97 L.Ed.2d at 685-92; Seawall Assoc. v. City of New York, 74 N.Y.2d 92, 112, 544 N.Y.S.2d 542, 542 N.E.2d 1059 (1989), *cert. denied,* Wilkerson v. Seawall Assoc., ___ U.S.___, 107 L.Ed.2d 503, 110 S.Ct. 500 (1989).

[22] Agins, 447 U.S. at 260, 65 L.Ed.2d at 112 (1980); Penn Central Transportation Co. v. New York City Landmarks Preservation, 438 U.S. at 138, 57 L.Ed.2d at 657 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158 (1922).

[23] Nollan, 483 U.S. at 841,67 L.Ed.2d at 692 (emphasis in original)(citing, Agins V. Tiburon, 447 U.S. 255, 260 (1980)).

the required nexus and not upon the physical occupation of private land. The Court reasoned that had the granting of the permit been conditioned on the dedication of a public viewing spot on the Nollans' property, such an imposition would have been constitutionally sound in light of the purpose sought to be advanced.

In contrast, in Penn Central v. New York City, this Court sustained the constitutionality of legislation which designated Grand Central Terminal (owned by Penn Central) as an historic landmark. Pursuant to state law, the City had enacted legislation designed to foster "civic pride in the beauty and noble accomplishments of the past."[24] In furtherance of this legislative purpose, the City's Landmarks Commission designated Grand Central Terminal as a landmark thereby restricting the owner's right to construct a 55 story structure above the terminal. In finding that there was not a taking in violation of the Fifth Amendment, the Court concluded that the "restrictions imposed are substantially related to the promotion of the general welfare."[25]

The New York Court of Appeals has followed the Court's precedent in takings analysis. In Seawall v. City of New York, the New York Court of Appeals struck down, as facially invalid, an ordinance which attempted to prevent owners of single room occupancy units from converting, destroying or warehousing these units and obligated them to rent these units at prescribed rates. The purpose of the legislation was to relieve homelessness. The New York Court of Appeals reasoned that there was not a "close nexus" between the purpose of the legislation and the obligations placed on property owners and that

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[24] 438 U.S. at 109, 57 L.Ed.2d at 639.

[25] 438 U.S. at 138, 57 L.Ed.2d at 657.

the obligations placed on property owners were of the type that should be bourne by society as a whole. In this regard the Court of Appeals stated:

> [T]he nexus between the obligations placed on [owners of single room occupancy properties] and the alleviation of the highly complex social problem of homelessness is indirect and at best conjectural. Such a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by law toward the cure of the homelessness problem ... [t]he terms of [the ordinance] itself demonstrate that the obligations placed on a few property owners are just the kind which could and should, be bourne by the taxpayers as a whole.[26]

Thus, whether a taking has occurred depends upon the relationship between the putative public purpose and the extent of the furtherance of that purpose by the statute. Petitioner seeks the writ of certiorari herein because respondent has shown no relationship where it is required to show a substantial one. The cases decided by this Court demonstrate that it is incumbent upon the respondent to set forth the putative public purpose of the challenged provisions and show how the challenged provisions operate to substantially advance such purpose(s). Further, this Court should decide whether it is appropriate for a few property owners to bear the burden of such purpose(s) or whether they are

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[26] Seawall, 74 N.Y.2d at 112.

of the type that should be bourne by society as a whole. The record will reflect that respondent has not even put forth any purported purpose of the challenged provisions, much less demonstrate a close nexus between any such purpose(s) and a legitimate state interest.

B. The Challenged Provisions Cannot Substantially Advance Any Legitimate State Interest

The challenged provisions constitute a taking of property without just compensation in violation of the Fifth Amendment because (i) such provisions do not substantially advance a legitimate state interest (and, in fact, run counter to the state's interest); (ii) there is not a "close nexus" between the interest of the state sought to be advanced and the burden imposed on property owners; and (iii) such provisions force property owners alone to bear public burdens which should be bourne by the public as a whole.

In the case at bar, respondent has failed to put forth any putative public purpose of the challenged provisions. Therefore, petitioner has resorted to the legislative findings in order to determine what those purposes may have been.[27] These purposes may include: (1) to prevent displacement of tenants in occupancy; (2) to alleviate a rental housing shortage, or to increase New York City's stock of rental housing; and (3) to provide rental housing at "reasonable " rents. It is evident from a reading of these legislative findings that the primary purpose of the statute was to prevent the displacement of tenants in

[27] The legislative findings to the Rent Stabilization Code are set forth as Appendix G.

occupancy. It is questionable as to whether the legislation was ever intended to regulate rents on vacant apartments.

1. The Challenged Provisions Do Not Affect Tenants in Occupancy.

If the challenged provisions are found unconstitutional by this Court, tenants in occupancy will not be affected. The challenged provisions apply only to vacant apartments and, therefore, only affect the initial rent. Thereafter, rent stabilized tenants enjoy the benefits of guaranteed lease renewal and limitation on rent increases. The rent ceiling has no further effect. Elimination of the challenged provisions would not affect tenants in occupancy.

2. The Challenged Provisions Do Not Alleviate a Housing Shortage -- They Promote One

The rent ceiling on a below-market apartment simply substitutes an artificial maximum rent for market value. The apartment will support only one tenancy - the only issue is at what price.

The record shows that owners have found it to be in their economic interest to keep low-rent rent stabilized apartments vacant, rather than renting these apartments with an artificially low rent for a potentially infinite term.[28] The income lost during

[28] The interest granted by a Rent Stabilized lease is actually greater than a life estate because Rent Stabilization Law vests a right of renewal of the lease not only to the lessee, but also to a broad definition of "family members" of the lessee who may legally succeed to the tenancy. See, Rent Stabilization Code of 1987, as amended, section 2520.6(o). Potentially, the estate granted by this lease is one in perpetuity.

the time a below-market unit is held vacant is little when compared to the consequences of the tenancy established. Owners can later convert the entire rental building to cooperative ownership, sell the vacant units at market value, and thereby avoid the challenged provisions on future vacated units. The challenged provisions have provided, and continue to provide, an incentive for owners to keep rent regulated units vacant and off the rental market, thereby reducing the total number of available rental units.[29] Thus, the challenged provisions provide an incentive for the warehousing of available units and actually promote a housing shortage rather than alleviate one.

3. The Challenged Provisions Do Not Provide Affordable Housing -- Substantial Premiums are Paid to Finders for Below-Market Rent Stabilized Units

The artificial rent ceiling does not provide housing at "reasonable" rents because prospective tenants pay substantial premiums in the form of brokerage commissions in exchange for below-market rent stabilized leases.[30] The interest granted has added value because the initial rental, and thus the subsequent guaranteed renewals, will be below market value. A person

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[29] Studies commissioned by the City of New York Department of Housing and Preservation & Development show that an estimated 70,000 rental units were kept vacant by owners at any given time from 1978 to present. See, New York City Housing and Vacancy Report 1987, Stegman, Michael A., p. 175.

[30] The New York Times has reported that "[i]n New York City, one of the biggest burdens of people seeking a rental [is the] broker's fee that typically amount[s] to 15% of the first year's rent." N.Y. Times, June 17, 1990, sec. 10 at p. 13, col.2.

seeking an apartment would be willing to pay a fee proportionate to the value of the interest. The further below market the rent, the more valuable the leasehold interest, and the higher the fee.

There is no ceiling on the amount of the broker's fee. Typically, it is an increasing percentage of the difference between the market rent and the legal maximum rent on the apartment. Considering these facts, a rent ceiling on a vacant rent stabilized unit does not help the "moderate income" person find affordable housing. Any discount from market value that the challenged provisions provide will not benefit a new tenant who pays for it in the form of a broker's fee.

In Hall v. Santa Barbara,[31] the 9th Circuit reversed the District Court's dismissal of an owner's taking claim where an ordinance worked to allow outgoing tenants to charge a premium to incoming tenants for below-market leasehold interests in mobile home sites. The rents that could be charged by the mobile home park owners were fixed. The lessees then capitalized on such value by selling their site to an incoming tenant at a substantial premium. Incoming tenants paid a substantial premium because they were purchasing an infinite term lease interest.

Similarly, in the case at bar, the person seeking an apartment pays a premium for the valuable leasehold interest in the form of a broker's fee. The substantial premiums paid for below-market rent stabilized apartments reflect the transfer of a valuable property right to occupy such apartments. Thus, any legitimate state interest sought to be furthered, has not been advanced because the incoming tenant has not obtained lodging at a "reasonable" rent, but has paid a premium for it.

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[31] 797 F.2d 1493 (9th Cir. 1986), *reh'g denied,* 813 F.2d 198 (1987), *cert. denied,* 485 U.S. 940 (1987).

In addition, as reasoned in Seawall, there is no method of earmarking the low-rent apartments for those who might need them and "there is simply no assurance that the units will be rented to members [of that group].[32] Given the conjectural means-end relationship of the legislation and its purpose, the challenged provisions are not constitutionally valid. Further, any societal interest sought to be advanced by the fifty dollar per month "discount" in rent, is exactly the type of burden which should be bourne by the taxpayers as a whole rather than by petitioner alone. In Justice Holmes' words, the State has stretched regulation past the constitutional limit to achieve a "shorter cut than the constitutional way of paying for the change."[33] Respondent should not be permitted to cloak itself in the presumption that merely because the challenged provisions were enacted many years ago they are constitutional. The challenged provisions do not fulfill any legitimate state interest and should not be sustained.

Further, the Rent Stabilization system of basing an incoming tenant's rent on the rent paid by the previous tenant leads to contradictory and often absurd results. It is questionable whether respondent could ever show that any legitimate state interest is advanced because the challenged provisions set legal maximum rents on vacant units on completely fortuitous historical events particular to the subject apartment and building. For instance, where an apartment was voluntarily vacated many times, the legal rent will be in excess of the market rent; but, if the same apartment was occupied by a single tenancy for the same period of years, then the legal maximum rent will be well below

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[32] Seawall, 74 N.Y.2d at 111.

[33] Pennsylvania Coal Co. v. Mahon, 260 U.S. at 416, 67 L.Ed. at 326 (1922).

the market rent. The result is that two identical vacant apartments will differ drastically in the legal maximum rent which the owner may collect from an incoming tenant.

The challenged provisions do not protect tenants in occupancy, do not alleviate a housing shortage, and do not provide housing at "reasonable" rents. Therefore, the challenged provisions do not advance any of the state interests set forth in the legislative findings.

POINT III
THE OVERCHARGE ORDER CONSTITUTES A TAKING OF PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT

The state takes private property for public use without compensation if in the exercise of its police power, it "does not substantially advance legitimate state interests . . . , or [if it] denies an owner economically viable use of his land . . ."[34] A regulation can effect a taking.[35] The challenged provisions originated in the aftermath of World War II and have existed in substantially the same form since 1974. They enjoy a presumption of constitutionality; however, all of the cases upholding such rent regulation have done so as temporary measures only.

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[34] Agins v. Tiburon, 447 U.S. 255, 260, 65 L.Ed.2d 106, 112 (1980).

[35] Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 83-84, 64 L.Ed.2d 741, 753-54 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 174, 62 L.Ed.2d 332, 342 (1979); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594, 8 L.Ed. 2d 130, 133-34 (1962); Pennsylvania Coal v. Mahon, 260 U.S. 393, 67 L.Ed.2d 322 (1922).

In Block v. Hirsch,[36] this Court upheld legislation entitling a commercial tenant to remain in occupancy after the expiration of his lease term. Citing public exigencies arising out of World War I which were adversely affecting the Federal Government's ability to transact the public business, this Court stated:

> The regulation is put and justified only as a temporary measure. . . . A limit in time, to tide over passing trouble, well may justify a law that could not be upheld as a permanent change.[37]

Three years later in Chastleton Corp. v. Sinclair,[38] the Court reversed the dismissal of an application to enjoin the order of the Commissioner of the District of Columbia purporting to fix rents. The plaintiff alleged that "the emergency that justified interference with ordinarily existing private rights in 1919 had come to an end in 1922, and no longer could be applied consistently with the 5th Amendment of the Constitution."[39] This Court answered, stating:

> We repeat what was stated in [Block] as to the respect due to a declaration of this kind by the legislature so far as it related to present facts. But, even as to them, a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . A law depending upon the existence of an emergency or other certain

[36] 256 U.S. 135, 65 L.Ed. 865 (1921).

[37] 256 U.S. at 157, 65 L.Ed. at 871 (citiations omitted).

[38] 264 U.S. 543, 68 L.Ed. 841 (1923).

[39] 264 U.S. at 546, 68 L.Ed. at 843.

> state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed.[40]

The Fifth Amendment's guarantee against takings is counterbalanced against the state's police power, and must yield when such public exigencies weigh heavier. However, as in the case at bar regarding the challenged provisions, where the public exigencies no longer exist, and/or the statutes no longer advance the public interest, the Fifth Amendment's guarantee against takings must prevail. Circumstances change, but the constitutional test for takings does not. As circumstances change, what may not have been a taking in the past, becomes a taking.

In Nollan, the challenged action of the state was stricken because it did not substantially advance the legitimate state interests which the statute sought to further. In Seawall, the legislation was stricken on its face because:

> [T]he nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness [was] indirect at best and conjectural.

In Pennsylvania Coal, the Court held unconstitutional, as a regulatory taking, a Pennsylvania law forbidding the mining of coal where it would cause the subsidence of any house where the coal company had ownership right to the coal. Applying a balancing approach, the Court would not sustain the statute as a valid use of the state's police power because the benefit to the state did not outweigh the burden on the coal company. The Court

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[40] 264 U.S. at 547, 68 L.Ed. at 843.

explained:

> When [the Fifth Amendment's] seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until it disappears. But that cannot be accomplished in this way under the Constitution of the United States . . . . We are in danger of forgetting that a strong public desire to impose the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.[41]

The Court protected the coal company's ownership rights even though the homeowner in possession had to vacate his home because the continued underground mining would cause it to collapse.

A statute cannot withstand scrutiny under the Fifth Amendment by the simple existence of a state interest coupled with a legislative assertion that the burden imposed on the property owner advances that interest.[42] If this were so, a legislature could burden any property owner without limit by making unsupported conclusions as to how the burdens advance the purpose,[43] and the police power would be unlimited. It is

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[41] Pennsylvania Coal, 260 U.S. 393, 415-16, 67 L.Ed. 322, 326 (1922) (citations ommitted).

[42] Nollan, 483 U.S. at 689-92; Seawall, 74 N.Y.2d at 112.

[43] Michelman, Frank I.,"Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law", 80 Harv. L. Rev. 1165, 1183 (1967).

not. The United States Constitution measures a taking of property not by what a state says or by what it intends, but by what it does.[44] The United States Constitution is the supreme law of the land.[45] When the federal or any state legislature exceeds the constitutional boundary it is the duty of the judiciary to uphold the Constitution.[46]

CONCLUSION

Petitioner requests that a writ of certiorari be granted.

DATED: June 25, 1991

Respectfully submitted,

Nicholas E. Brusco
PRO SE
163 West 74th Street
New York, N.Y. 10023
(212) 595 - 9590

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[44] Hughes v. Washington, 389 U.S. 290, 298, 19 L.Ed.2d 530, 536 (1967).

[45] United States Constitution Art VI, cl. 2; Chicago, B. & Q. R. Co v. City of Chicago, 166 U.S. 226, 233-34, 41 L.Ed. 979, 983-84 (1896); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

[46] United States Constitution Art VI, cl. 3.

APPENDIX A

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourth day of April A.D. 1991

Present, HON SOL WACHLER,
Chief Judge, presiding.

Mo. No. 378 SSD 27

In the Matter of Nicholas E. Brusco,

Appellant,

v.

New York State Division of
Housing & Community Renewal,

Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Judge Titone took no part.

Donald M. Sheraw
Clerk of the Court

APPENDIX B

Murphy, P.J, Milonas, Ross, Asch, Rubin, JJ.

42250 Nicholas E. Brusco,
Petitioner-Appellant,

- against -

New York State Division of Housing
and Community Renewal,
Respondent-Appellant.

Order, Supreme Court, New York County (Helen Freedman, J.) entered September 29, 1989, which dismissed the landlord's petition seeking review of a determination of the New York State Division of Housing and Community Renewal which established the lawful stabilized rent for the subject housing unit and directed petitioner to refund rent overcharges to the tenant, unanimously affirmed, without costs.

The tenant in Apartment 1B at 118 West 69th Street, New York, New York. filed a rent overcharge complaint on February 15, 1984. The petitioner, who is the landlord of those premises, failed to submit a complete rent history as he was requested. The District Rent Administrator issued an order on August 12, 1986 finding the owner in default, setting the rent at $564.15 as of August 1984 and finding an overcharge, including interest and excess security of $5,818.03. When petitioner filed a Petition for Administrative Review ("PAR"), he stated that he was unable to produce leases prior to 1980, the year he purchased the building. The Deputy commissioner denied the PAR.

Effective April 1, 1984, the Rent Stabilization Code

required landlords to keep rent records for an apartment for four years. The law in effect on April 1, 1984 ("old law") required the landlord to maintain a complete rent history. Although New York State Division of Housing and Community Renewal's order was issued after April 1, 1984, the overcharge complaint was filed previously thereto. As this Court has held in Lavanant v. DHCR, (148 AD2d 185), the "old law" is to be applied.

Petitioner's argument that the respondent has not complied with its request under the Freedom of Information Law to obtain prior rent records was first made after the PAR was denied. In the course of judicial review, the court may not consider arguments or evidence not contained in the admnistrative record. (Rozmae Realty v. DHCR, 160 AD2d 343, lv to appeal denied, 76 NY2d 712.) We therefore find that the administrative agency's determination was supported by a rational basis.

Furthermore, petitioner has failed to rebut the presumption of constitutionality of the Rent Stabilization Code by proof beyond a reasonable doubt as it relates to the imposition of a rent ceiling on vacant units. (See, Hotel Dorset Co. v. Trust for Cultural Resources, 46 NY2d 358, 370.)

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED : February 5, 1991

FRANCIS X. GALDI
Clerk.

APPENDIX C

SUPREME COURT : New York County
CIVIL BRANCH
IAS : Part 30

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In the Matter of THE APPLICATION OF
NICHOLAS E. BRUSCO, Petitioner, for
a Judgment pursuant to Article 78 of the
Civil Practice Law & Rules, in
the Nature of Certiori,

Index No.
- against - 06904/ 89

NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,

Respondent.

----------X

HELEN E. FREEDMAN, J.:

In this Article 78 proceeding, petitioner Nicholas E. Brusco ("Brusco") seeks to overturn an order of the District Rent Administrator ("Administrator") requiring him to repay a tenant for rent overcharges as arbitrary and capricious and unconstitutional. Respondent New York State Division of Housing and Community Renewal ("DHCR") contends that the petition is time barred and, in addition, that the order in dispute is calculated in accordance with established agency procedures and controlling case law in this Department.

Brusco acquired the property located at 118 West 69th Street, New York, New York from his father in December 1983. His father had purchased this property from a third party in May

1980. One of the tenants with a lease dated July 1979 filed a complaint of rent overcharge with the Administrator in February 1984. When requested to provide a rental history for the subject apartment by the Administrator, Brusco answered that he was never given a complete set of leases by the previous owner.

The Administrator counted Brusco's failure to supply a complete rental history as a default and computed the rent overcharge due to the complaining tenant by established agency guidelines for defaulting landlords. Brusco's petition for administrative review (PAR) was denied on January 30, 1989, received by him on February 6, 1989 and he subsequently served this Article 78 proceeding upon DHCR on August 4, 1989.

Pursuant to section 26-516(d) of the Administrative Code of the City of New York, Article 78 proceedings challenging determinations of the Administrator must be commenced within sixty (60) days of the determination. In Brusco's case, he was not aware of this adverse determination until February 6th when he received notification. To begin the running of the statute of limitations against Brusco before he could have been aware of the denial of his PAR runs counter to the purpose of "notice." See Gruber v. State Division of Housing and Community Renewal, NYLJ, July 13, 1989, p. 21, col. 4 (1st Dept.). Thus, service of Brusco's petition on April 4, 1989 was timely.

Turning to the merits of the petition, Brusco contends that the Administrator was arbitrary and capricious in requiring him to produce rental records for more than four years prior to the initial or most recent annual rent registration in violation of 2523.7(c) of the Rent Stabilization Code (in effect on April 1, 1984). He cites In re JRD Management Corp v. Eimicke, 539

NYS2d 667 (2nd Dept. 1989) for the proposition that the Administrator should have applied the Rent Stabilization Law in effect at the time of its determination of the complaint (here 1986) rather than the law in effect at the time of the tenant's overcharge complaint (here February 1984).

Petitioner's reliance on Eimicke is misplaced. Unlike the tenant in Eimicke, the tenant in this case filed his complaint prior to the April 1984 change in the Rent Stabilization Law. Section 2526.1(a) of the Rent Stabilization Code (promulgated May 1, 1987) provides, in part, that "complaints filed prior to April 1, 1984 shall be determined in accordance with the Rent Stabilization Law and Code provisions in effect on March 31, 1984 . . ." . The Code provisions in effect at the time of the complaint required Brusco to submit a complete rental history when answering a rent overcharge complaint. Requiring Brusco to provide a complete rental history is consistent with the legislative intent in delaying the effective date for the four year limitation on the production of rental records for complaints pending at the time of the change in the law. See Lavanant v. DHCR, 1 NYLJ, July 26, 1989, p. 17, col. 3 (1st Dept.).

Moreover, the requirement that a rental history be maintained is not waived by the fact that the owner failed to obtain copies of prior leases from his predecesor. The alternate method of calculating rentals and determining overcharge complaints was sustained in 61 Jane St. Assoc. v. CAB, 65 NY2d 898 aff'g 108 AD2d 636. Thus, the Administrator's decision to hold Brusco in default for failing to provide a complete rental history was neither arbitrary nor capricious, nor contrary to established law.

The argument that the rent control laws constitute an unconstitutional taking of property or are confiscatory was

rejected by the Court of Appeals in Benson v. Beame, 50 NY2d 994 on the ground that the need for control was a matter for legislative determination. That Court found that the legislature had examined the need for controls and make a rational determination at regular intervals. Similarly, the United States Supreme Court upheld rent control legislation as a valid exercise of police power by a local government in Pennell v. City of San Jose, 485 US ___, 108 S. Ct. ___, 99 L. ED 1 (1988). The Pennell Court concluded that a local government may regulate rents during times when there is a wide discrepancy between supply and demand for housing and retains the power to determine when such an emergency exits. For the reasons set forth in those case, plaintiff's current attack on the constitutionality of the rent control laws is without merit.

Accordingly, the petition is dismissed.

The foregoing constitutes the decision and order of the court.

Dated: SEPTEMBER 22, 1989

J. S. C.

APPENDIX D

STATE OF NEW YORK
DIVISION OF HOUSING AND COMMUNITY RENEWAL
OFFICE OF RENT ADMINISTRATION
GERTZ PLAZA
92-31 UNION HALL STREET
JAMAICA, NEW YORK 11433

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IN THE MATTER OF THE ADMINISTRATIVE APPEAL OF

NICHOLAS BRUSCO,

PETITIONER

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Administrative Review Docket
No.: AI 410057-RO
DRO Docket No.: L-3115338
CDR 20864

ORDER AND OPINION DENYING PETITION FOR ADMINISTRATIVE REVIEW

On September 16, 1986 the above named petitioner-owner filed a Petition for Administrative Review against an order issued on August 12, 1986, by the District Rent Administrator, 10 Columbus Circle, New York, New York concerning housing accommodations known as Apartment 1B at 118 West 69th Street, New York, New York, wherein the District Rent Administrator determined that the owner had overcharged the tenant.

The Commissioner notes that this proceeding was filed

prior to April 1, 1984. Sections 2526.1(a)(4) and 2521.1(d) of the Rent Stabilization Code (effective May 1, 1987) governing rent overcharge and fair market rent proceedings provide that determination of these matters be based upon the law or code provisions in effect on March 31, 1984. Therefore, unless otherwise indicated, reference to Sections of the Rent Stabilization Code (Code) contained herein are to the Code in effect on April 30, 1987.

The issue in this appeal is whether the District Rent Administrator's order was warranted.

The applicable section of the Law is Section 42A of the former Rent Stabilization Code.

The Commissioner has reviewed all of the evidence in the record and has carefully considered that portion of the record relevant to the issue raised by the administrative appeal.

This proceeding was originally commenced by the filing in February 1984 of a rent overcharge complaint by the tenant, (Walter Orzel). Mr. Orzel stated that he first moved to the subject apartment in July 1979.

The owner was served with a copy of the complaint and was directed to submit a complete rental history for the subject apartment from the base date including copies of all leases. In response the owner only submitted leases from July 1979 and stated that the prior owner had not furnished him with any earlier leases, that the subject apartment is a garden apartment and that other apartments in the subject premises have higher rents even though they do not have gardens.

In Order Number CDR 20864, the District Rent Administrator determined that due to the owner's failure to submit a complete rental history, the owner had collected a rent

overcharge of $5810.03 including excess security and interest on that portion of the overcharge occurring on and after April 1, 1984 and directed the owner to refund such overcharge to the tenant.

In this petition, the owner contends in substance that the Rent Administrator did not prove that there was a rent overcharge and that the owner could not submit a complete rental history because the prior owner did not provide him with one. Subsequently, the owner submitted a supplement to his Petition stating in substance that the Rent Stabilization Law as applicable to this case is unconstitutional.

In response to the owner's petition, the tenant stated in substance that the Rent Administrator's order was warranted.

The Commissioner is of the opinion that this petition should be denied.

Section 42A of the Rent Stabilization Code requires that an owner retain complete rent records for each stabilized apartment in effect from June 30, 1974 to date and produce them to the DHCR upon demand. If the apartment was decontrolled from Rent Control Law the owner must provide satisfactory documentary evidence of the apartment's date of decontrol.

In the instant case, the owner was directed to submit a complete rental history. The owner failed to submit leases or rent ledgers going back to June 30, 1974 or to show that the tenant's lease was the initial stabilized lease after decontrol from Rent Control Law. The fact that a prior owner may have failed to give the owner herein a complete rental history does not excuse the current owner's failure to submit a complete rental history as mandated by Section 42A. Therefore, the Commissioner finds that the Administrator properly found that the owner had defaulted in its obligation to provide a full rental history and

properly computed the legal regulated rent in accordance with established procedures.

THEREFORE, in accordance with the Rent Stabilization Law and Code, the Emergency Tenant Protection Act of 1974 and Chapter 403 of the Laws of 1983 as amended by Chapter 102 of the Laws of 1984 as implemented by Operational Bulletin 84-1, it is

ORDERED, that this petition be, and the same hereby is, denied; and that the Rent Administrator's order be, and the same hereby is, affirmed.

ISSUED: JAN 30 1989

ELLIOT SANDER
Deputy Commissioner

APPENDIX E

STATE OF NEW YORK
DIVISION OF HOUSING AND COMMUNITY RENEWAL
OFFICE OF RENT ADMINISTRATION
10 COLUMBUS CIRCLE, 11TH - FLOOR
NEW YORK, N.Y. 10019

DISRICT RENT ADMINISTRATOR ORDER NUMBER CDR #20,864

Docket Number:	L-3115338-R
Tenant:	Walter Orzel
Address:	118 West 69th Street Apt 1B New York, NY 10023
Subject Building:	Same as Apt # 1B
Owner:	Nicola S. Brusco
Address:	163 West 74th Street New York, NY 10023

FACT:

The dwelling unit involved is subject to the Rent Stabilization Law.

This proceeding involves a complaint of general rent overcharge. The owner was served with a copy of the tenant's complaint and was requested to submit complete copies of all leases or rent records pursuant to Section 42A of the Code. The owner was advised that its failure to provide the requested information would be considered a default.

To date, the owner has failed to provide a full rental history for the subject apartment although requested to do so.

APPLICABLE LAW AND REGULATIONS

Section 10B, 20A, 42A and 63 of the Rent Stabilazation Code.
Section 14, Chapter 403, Laws of 1983.
Rent Guideline Board Order Number #11, 12, 13, 14 and 15.

DETERMINATION:

Due to the owner's failure to provide a full rental history and pursuant to the applicable laws and regulations cited above, it is determined that $ 564.75 is the lawful stabilization rent as of August 1, 1984 through July 31, 1986. Subsequent renewal or vacancy lease shall be computed on this base rent.

The owner is directed to roll back the rent to the lawful stabilized amount, and to make full refund to the tenant pursuant to Section 10B of the Rent Stabilization Code for any rent paid in excess of the lawful stabilization rent as set forth on the annexed Rent Calculation Chart and to refund any security in excess of one month's rent pursuant to Section 63 of the Code.

In the event the owner fails to make the refund before the next month's rent is due, please refer to the attached form entitle, "NOTICE TO RENT STABILZED TENANT CONCERNING PAYMENT OF PENALTIES WHICH LANDLORD HAS BEEN DIRECTED TO PAY BY AN ADMINISTROR'S ORDER" (Form RN-14), for details about collecting your refund.

Issued: August 12, 1986

Joseph A Cordero
District Rent Administrator

DEFAULT RENT COMPUTATION

Premises: 118 West 69th Street
Apartment: 1B
Tenant: Walter Orzel

The lawful stabilized rent is established as follows:

1) The lowest stabilized rent for the same size apartment as the subject apartment (as indicated on the Division's apartment registration), without guidelines adjustment for the complainant's vacancy lease; or

The lowest stabilized rent of $ Unknown .
Apartment number: Unknown .

2) The complaining tenant's initial rent, minus the initial guidelines adjustment and vacancy allowance lawfully chargeable when the tenant took occupancy.

The Complaining tenant's vacancy rent of $ 425.00 minus a guideline increase of 8 1/2 % and vacancy allowance of 5 % pursuant to Rent Guidelines Board Order Number 11 = $ 372.45 .

3) The last rent paid by the prior tenant.
Last rent paid by prior tenant:
$ UNKNOWN .

Computation under Method Number 2 results in the lowest amount and therefore, has been adopted.

DHCR RENT OVERCHARGE CALCULATION SYSTEM 07/18/86

TENANT NAME : WALTER ORZEL DOCKET # : L-3115338-R

LEASE NUMB	GUIDELINE NUMB	BASE RENT TO ADJUST	GUIDELINE INCREASE	VACANCY ALLOW	ELECTRIC	TOTAL PCT	STAB	SPECIAL ALLOW
1	11	374.45	0.0%	0.0%	0.0%	0.0	0.0%	0.00
2	12	374.45	11.0	0.0	0.0	11.0	0.0	0.00
3	12	415.64	11.0	0.0	0.0	11.0	0.0	0.00
4	13	461.36	10.0	0.0	0.0	10.0	0.0	0.00
5	14	507.50	4.0	0.0	0.0	4.0	0.0	0.00
6	15	527.80	7.0	0.0	0.0	7.0	0.0	0.00

DHCR RENT OVERCHARGE CALCULATION SYSTEM 07/18/06

TENANT NAME : WALTER ORZEL

DOCKET # : L-3115338-R

LEASE NUMB	FCA 10B		FCA 10C	FCA 10D	FCA 11	TOTAL TEMP LEASE ADJ.
1	0.0	0.00	0.00	0.00	0.00	0.00
2	0.0	0.00	0.00	0.00	0.00	0.00
3	0.0	0.00	0.00	0.00	0.00	0.00
4	0.0	0.00	0.00	0.00	0.00	0.00
5	0.0	0.00	0.00	0.00	0.00	0.00
6	0.0	0.00	0.00	0.00	0.00	0.00

DHCR RENT OVERCHARGE CALCULATION SYSTEM 07/18/9

TENANT NAME : WALTER ORZEL DOCKET N : L-3115338-K

LEASE NUMB	LEASE START	LEASE END	GDLN NUMB	YEARS LEASE	TENANT NUMB	AMOUNT CHARGED	LEGAL REG RENT	OVERCHARGE PER MONTH
1	07/15/79	07/31/80	11	1.00	1	425.00	374.45	50.55
2	08/01/80	07/31/81	12	1.00	1	471.75	415.64	56.11
3	08/01/81	07/31/82	12	1.00	1	523.64	461.36	62.28
4	08/01/82	07/31/83	13	1.00	1	576.04	507.50	68.54
5	08/01/83	07/31/84	14	1.00	1	599.08	527.80	71.28
6	08/01/84	07/31/86	15	2.00	1	641.01	564.75	76.26

DHCR RENT OVERCHARGE CALCULATION SYSTEM 07/18/86

TENANT NAME : WALTER ORZEL DOCKET # : L-3115338-R

LEASE NUMB	MONTHS PRE 4/1/84	OVRCHRG ON REG RENT PRE 4/1/84	SUM OF TEMPORARY ADJUSTMENTS PRE 4/1/84	OVRCHRG PRE 4/1/84
1	12.56	634.90	0.00	634.90
2	12.00	673.32	0.00	673.32
3	12.00	747.36	0.00	747.36
4	12.00	822.48	0.00	822.48
5	8.00	570.24	0.00	570.24
6	0.00	0.00	0.00	0.00

LEASE NUMB	MONTHS AFTER 4/1/84	OVRCHRG ON REG RENT AFTER 4/1/84	SUM OF TEMPORARY ADJUSTMENTS AFTER 4/1/84	OVRCHRG AFTER 4/1/84
1	0.00	0.00	0.00	0.00
2	0.00	0.00	0.00	0.00
3	0.00	0.00	0.00	0.00
4	0.00	0.00	0.00	0.00
5	4.00	285.12	0.00	285.12
6	24.00	1830.24	0.00	1830.24

DHCR RENT OVERCHARGE CALCULATION SYSTEM 07/18/86

TENANT NAME : WALTER ORZEL DOCKET # : L-3115338-R
BLDG & APARTMENT : 118 WEST 69TH STREET 1B
CITY & STATE : NEW YORK, NY 10023

TEN. MAILING ADDR.: SAME AS APT# 1B
CITY & STATE :

OWNER NAME : NICOLA S. BRUSCO
OWNER ADDRESS : 163 WEST 74TH STREET
CITY & STATE : NEW YORK, NY 10023

OVERCHARGE PRE 4/1/84			= $ 3448.30
OVERCHARGE AFTER 4/1/84	2115.36	+ INTEREST	= $ 2285.47
EXCESS SECURITY			= $ 76.26
ATTORNEY'S FEES			= $ 0.00
OTHER COSTS			= $ 0.00
			==========
TOTAL OVERCHARGE (INCLUDING INTEREST)			$ 5810.03

APPENDIX F

SECTION 10. EFFECT OF THIS CODE ON LEASES AND OTHER RENTAL AGREEMENTS

A. Inconsistent lease provisions to be suspended and barred. The provisions of any lease or other rental agreement shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with the RSL or this Code, in which event such provisions shall be suspended; provided, however, that nothing herein contained shall be deemed to supercede or modify the rent increase established pursuant to Section Y51-12 of the City Rent Law or Section 2(f)15 of the City Rent Regulations issued thereunder. Henceforth no lease shall contain any provisions which are inconsistent with the RSL or this Code.

B. Duty to Refund. Each member of the Industry Association shall credit an eligible tenant by cash refund or credit against future rent in the amount of excess, if any, paid since January 1,1969, or after the dwelling unit becomes subject to the RSL, whichever is later, over the rents established by the RSL or this Code, except that refunds ordered by the CAB pursuant to Section 25 of this Code shall be in the amount of excess, if any, paid above the Initial Legal Regulated Rent since January 1, 1974 or the date of the commencement of the tenancy, whichever is later. In the event such refund is provided by future credit, the amount of monthly credit shall not be less than the amount obtained by dividing the total refund by the number of months remaining under the lease and starting such payment or credit no later than January 1, 1969; except that in the case of refunds ordered pursuant to Section 25 of this Code, the CAB may direct that the refund be made in cash or as a credit against future rents over a period not in excess of six months.

SECTION 20. STABILIZATION RENTS

A. Stabilization rents for the following dwelling units shall be:

(1) For all dwelling units subject to this Code on June 30, 1974, the stabilization rent as defined in Section 2(i) of this Code shall be the rent charged on May 31, 1968, plus any increase on vacancy lease or lease renewal permitted by the RSL and as established by the Rent Guidelines Board.

(2) For all dwelling units which become subject to this Code on or after July 1, 1974, the stabilization rent shall be as defined in Section 2(i) of this Code.

(3) All dwelling units subject to the RSL on June 30, 1974, or which become subject to the RSL on or after July 1, 1974, continue to be governed by the provisions of the RSL upon vacancy or renewal of the tenancy.

(4) For dwelling units which become subject to the RSL on or after July 1, 1974, the owner may provide in any lease or other rental agreement commencing on or after July 1, 1974, but before the issuance of Rent Guidelines Board Orders applicable to such dwelling units, that the lease rent may be adjusted in accordance with the appropriate guideline order effective on the first day of the month next succeeding the effective date of such guideline order; provided, however, that for those dwelling units which were subject to the City Rent Law on June 30, 1974, and thereafter became subject to the RSL as a result of a vacancy, the owner may not increase the rent charges in the initial lease, or other rental agreement, whichever is later.

(5) Such stabilization rents shall not be exceeded by any owner. Nothing herein shall give the right to an owner to increase the rent charged under an existing lease even though such lease is at a lower rate than that permitted by the RSL, except as provided in Section 42 of this Code.

SECTION 42. LEASE AGREEMENTS

A. (1) Where the owner and tenant have entered into a valid written renewal or vacancy lease with respect to any dwelling unit which provides for the payment of rent in excess of the rent payable under the expiring or prior lease, the stabilization rent shall automatically be increased; provided however, that the owner shall be required to exhibit to (i) the tenant of a dwelling unit subject to the RSL on June 30, 1974, who is under a vacancy lease, a copy of the lease in effect on May 31, 1968 and any lease or order subsequent thereto; (ii) the tenant of a dwelling unit which becomes subject to the RSL July 1, 1974, who is under a vacancy lease, a copy of the lease in effect on June 30, 1974 and any lease or order subsequent thereto; and (iii) the tenant of a dwelling unit which becomes subject to the RSL after July 1, 1974 who is under a vacancy lease, a copy of the first lease in effect after the dwelling unit becomes subject to the RSL and any lease or order subsequent thereto; and further, the owner shall be required to include a rider in all leases which clearly sets forth (i) the tenants right to examine such prior leases and orders, (ii) the rent payable under such prior leases and orders and (iii) the name of the tenant in the last prior lease.

(2) It shall be the duty of an owner to retain all leases described in paragraph 1 of this subdivision and to produce them on demand of the Association, the CAB, the Department of Housing Preservation and Development or a new purchaser for as long as the Rent Stabilization Law or any extension thereof is in effect for such dwelling unit.

(3) The tenant of a dwelling unit which was subject to the City Rent Law prior to July 1, 1971 whose tenancy commenced on or after January 1, 1974, and prior to July 1, 1974, shall be entitled to examine all leases in effect since December 1, 1973 and the tenant of a dwelling unit which was subject to the RSL prior to July 1, 1974 and June 30, 1974 both dates inclusive, shall be entitled to examine all leases in effect since May 31, 1968, and

such tenant's lease must so provide in the manner set forth in paragraph (1) of this subdivision. The owner shall retain copies of such leases and exhibit same in the manner as prescribed in paragraph (2) of this subdivision.

RENT GUIDELINE ORDER #11 -- Rent Levels July 1, 1979 through June 30, 1980.

Adjustments for Renewal Leases

Together with such further adjustments as may be authorized by the Board, as explained below:

-For one year leases expiring before July 1, 1981: 8.5 %

-For two year leases expiring before july 1, 1982: 12%

-For three year leases expiring before July 1, 1983: 15%

Leases on Vacant Apartments

Where a dwelling unit becomes vacant, the levels of rent increase governing a new tenancy commencing on or after July 1, 1979 and on or before June 30, 1980 are the same levels over rentals charged on June 30, 1979 as those set forth above for lease renewals, plus 5 per cent over the rentals charged on June 30, 1979 on each vacancy of such unit during the effective period of this Order.[1]

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[1] Rent Guidelines Board Order numbers 12 through 22 are similarly structured with renewal lease increases varying from 3% to 14%, and vacancy increases varying from 0% to 15%. Currently, the renewal increases are 4.5% and 7% for a one or two year renewal, respectively, and the vacancy rate is 5%.

RENT STABILIZATION CODE of May 1, 1987.[2]

Part 2521 - LEGAL REGISTERED AND REGULATED RENTS
Section 2521.1 Initial legal registered rents for housing accommodations.

(a)(1) For housing accommodations which on March 31, 1984, were subject to the City Rent Law, and became vacant after that date, and which are no longer subject to the City Rent Law, and are rented thereafter subject to the RSL, the initial legal registered rent shall be the rent agreed to by the owner and the tenant and reserved in a lease or provided for in a rental agreement subject to the provisions of this Code, provided that such rent is registered with the DHCR pursuant to Part 2528 of this Tile (Registration of Housing Accommodations), and subject to a tenant's right to a Fair Market Rent Appeal to adjust such rent pursuant to section 2522.3 of this Title.

(2) For housing accommodations which on March 31, 1984 were subject to the penalties provided in former section YY51-4.0 of the Administrative Code of the City of New York, and which became vacant thereafter, the initial legal registered rent for the first rent stabilized tenant shall be the rent established by the DHCR for the prior tenant, increased by the guidelines rate of rent adjustments applicable to the new lease plus such other rent increases as are authorized pursuant to section 2522.4 of this Title (Adjustment of Legal Regulated Rent), and shall not be subject to a Fair Market Rent Appeal pursuant to section 2522.3 of this Title.

PART 2522 - RENT ADJUSTMENTS
Section 2522.3 Fair Market Rent Appeal.

(a) Except as provided in section 2521.1(a)(2) of this Title (Initial Legal Registered Rents), an appeal of the Initial Legal Registered Rent on the ground that it exceeds the Fair Market Rent

[2] These provisions are also found in the Administrative Code of the City of New York, sec. 26-501 et. seq.

Registered Rent on the ground that it exceeds the Fair Market Rent for the housing accommodation which was subject to the City Rent Law on December 31, 1973. If the housing accommodation was registered in accordance with Part 2528 of this Title (Initial Registration), this right is limited to the first tenant taking occupancy on or after April 1, 1984, except where such tenant had vacated the housing accommodation prior to the service by the owner of the Notice of Initial Legal Registered Rent as required by section 2523.1 of this Title. In such event, any subsequent tenant in occupancy shall also have a right to file a Fair Market Rent Appeal until the owner mails the required Notice and 90 days shall have elapsed without the filing of an appeal by a tenant continuing in occupancy during said 90 day period. Once a Fair Market Rent Appeal is filed, no subsequent tenant may file such appeal. Notwithstanding the above, where the first tenant taking occupancy after December 31, 1973, of a housing accommodation previously subject to the City Rent Law, was served with the notice required by section 26 of the former Code of the Rent Stabilization Association of New York City, Inc., the time within which such tenant may file a Fair Market Rent Appeal is limited to 90 days after such notice was mailed to the tenant by the owner by certified mail.

(b) The tenant need only allege in such appeal:

(1) that the initial legal registered rent is in excess of the Fair Market Rent; and

(2) such facts which, to the best of his or her information and belief, support such allegation.

(c) Such appeal shall be dismissed where:

(1) the housing accommodation was subject to the City Rent Law prior to July 1, 1971, and the initial legal registered rent does not exceed the maximum rent as calculated pursuant to the City Rent Law for the period commencing January 1, 1974 and ending December 31, 1975, whether or not the housing accommodation was subject to the City Rent Law on that date,

leases pursuant to Guidelines Board Order No. 6 issued June 28, 1974 and effective July 1, 1974, and Order No. 6C, issued February 7, 1975, and effective July 1, 1974, for any lease or other rental agreement commencing on or after January 1, 1974; or

(2) the appeal is filed more than 90 days after the certified mailing to the tenant of the Initial Apartment Registration, together with the Notice pursuant to section 2523.1 of this Title (Notice of Initial Legal Rent).

(d) The order shall direct the affected owner to make the refund of any excess rent tot he tenant in cash, check or money order, and to the extent the present owner is liable for all or any part of the refund, such present owner may credit such refund against future rents over a period not in excess of six months. If the refund exceeds the total rent due for six months, the tenant at his or her option may continue to abate his or her rent until the refund is fully credited, or request the present owner to refund any balance outstanding at the end of such six month period.

(e) In determining Fair Market Rent Appeals, consideration shall be given to the applicable guidelines promulgated for such purposes by the Rent Guidelines Board and to rent generally prevailing for substantially similar housing accommodations n buildings located in the same area as the housing accommodation involved. The rents for these comparable housing accommodations may be considered where such rents are:

(1) Legal regulated rents, for which the time to file a Fair Market Rent Appeal has expired and no Fair Market Rent Appeal is then pending, or the Fair Market Rent Appeal has been finally determined, charged pursuant to a lease commencing within a 4 year period prior to, or a one year period subsequent to, the commencement date of the initial lease for the housing accommodation involved; and

(2) At the owner's option, market rents in effect for other comparable housing accommodations on the date of the initial lease for the housing accommodation involved as submitted by the owner.

comparable housing accommodations on the date of the initial lease for the housing accommodation involved as submitted by the owner.

(f) Where the rents of the comparable housing accommodations being considered are legal regulated rents, for which the time to file a Fair Market Rent Appeal has expired, and such rents are charged pursuant to a lease ending more than 1 year prior to the commencement date of the initial lease for the subject housing accommodation, such rents shall be updated by guidelines increases for 1 year renewal leases, commencing with the expiration of the initial lease for the comparable housing accommodation to a date within 12 months prior to the renting of the housing accommodation involved.

2522.5 Lease Agreements.

(a) Vacancy lease or rental.

(1) For housing accommodations other than hotels, upon the renting of a vacant housing accommodation, the owner shall provide to the tenant a copy of the fully executed lease for a one or two year term, at the tenant's option (except where a mortgage or mortgage commitment existing as of April 1, 1969, prohibits the granting of one-year lease terms), bearing the signature of the owner and tenant and the beginning and ending dated of the lease term, within 30 days from the owner's receipt of the vacancy lease signed by the tenant. Such lease shall conform to the intent of section 5-702 of the General Obligations Law ("Plain English"). The rent provided therein may not exceed the last legal regulated rent in addition to all increases authorized by this Code. For a housing accommodation subject to the City Rent Law whcih becomes vacant after March 31, 1984, the owner may not increase the rent charged in the initial lease or other rental agreement pursuant to annual guidelines for a period of one year or until the expiration fo the initial lease or rental agreement, whichever is later. . . .

lease form pursuant to paragraph (1) of subdivision (a) or paragraph (1) of this subdivision (b), the DHCR shall order the owner to furnish the copy of the vacancy lease or renewal lease form. In addition to any other penalties provided under this code, non-compliance by the owner within 20 days of such order shall result in the denial of any rent guideline increases for vacancy or renewal until the fully executed copy of the vacancy lease or renewal lease form is furnished by the owner to the tenant.

Part 2523 - NOTICES AND RECORDS

Section 2523.1 Notice of Initial Legal Registered Rent.

Every owner of housing accommodations previously subject to the City Rent Law, and thereafter rented to a tenant on or after April 1, 1984, shall within 90 days after the housing accommodations became subject to the RSL, give notice in writing by certified mail to the tenant of each such housing accommodation on a form prescribed by the DHCR for that purpose, reciting the Initial Legal Registered Rent for the housing accommodation and the tenant's right to file an application for adjustment of the Initial Legal Registered Rent within 90 days of the certified mailing to the tenant of the notice pursuant to section 2522.3 of this Title (Fair Market Rent Appeal).

2523.7 Records and record-keeping.

(a) Every owner shall keep, preserve, and make available for examination, records from the date immediately prior to the date the housing accommodation became subject to the RSL, of the same kind as he or she has customarily kept relating to the rents received for housing accommodations, and individual housing accommodation and building-wide services provided or required to be provided on the applicable base date.

(b) Except as provided in subdivision (c) of this section, every owner subject to this Code shall also keep, preserve, and make available for examination, records from the date immediately prior to the date the housing accommodation became subject to the

(b) Except as provided in subdivision (c) of this section, every owner subject to this Code shall also keep, preserve, and make available for examination, records from the date immediately prior to the date the housing accommodation became subject to the RSL, showing the rents received for each housing accommodation, the particular term and number of tenants for which such rents were charged, and the name of each tenant, and the individual housing accommodation and building-wide services provided or required to be provided on the applicable base date.

(c) Any owner who has duly registered a housing accommodation pursuant to Part 2528 of this Title, shall not be required to maintain or produce any records relating to rental of such accommodation more than four years prior to the initial or most recent annual registration for such accommodation. Notwithstanding the above, such owner shall continue to maintain records for all housing accommodations for which a complaint of overcharge or a Fair Market Rent Appeal was filed by a tenant prior to April 1, 1984, or a challenge to an initial registration is filed, until a final order of the DHCR is issued.

(d) In the absence of collusion or any relationship between a prior owner and an owner who purchases upon a judicial sale, such purchaser shall not be required to comply with the provisions of subdivisions (a) and (b) of this section for the period prior to such sale, except where records sufficient to establish the legal regulated rent are available to such purchaser. This subdivision (d) shall not be construed to waive the purchaser's obligation to register pursuant to Part 2528 of this Title.

APPENDIX G

Findings and declaration of emergency.[1] The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York and will continue to exist after April first, nineteen hundred seventy-four; that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist an acute shortage of dwellings which creates a special hardship to persons and families occupying rental housing; that the legislation enacted in nineteen hundred seventy-one by the State of New York removing controls on housing accommodations as they become vacant, has resulted in sharp increases in rent levels in many instances; that the existing and proposed cuts in federal assistance to housing programs threaten a virtual end to the creation of new housing thus prolonging the present emergency; that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; that to prevent such perils to health, safety and welfare, preventive action by the council continues to be imperative; that such action is necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare; that the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency...

The council further finds that prior to the adoption of

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[1] Admin. Code of the City of New York, section YY51-1.0 (1974)(currently found in section 26-501 of the new code). New York City's legislative findings track those of the State of New York, which are found in 1974 N.Y. Laws, chap. 576, sec. 2.

local laws sixteen and fifty-one of nineteen hundred sixty-nine many owners of housing accommodations in multiple dwellings not subject to the provisions of the city rent and rehabilitation law, enacted pursuant to said enabling authority, either because they were constructed after nineteen hundred forty-seven or because they were decontrolled due to monthly rental of two hundred fifty dollars or more or for other reasons were demanding exorbitant and unconscionable rent increases as a result of the aforesaid emergency which led to a continuing restriction of available housing as evidenced by States bureau of the census; that prior to the enactment of said local laws such increases were being exacted under stress of prevailing conditions of inflation and of an acute housing shortage resulting from a sharp decline in private residential construction brought about by a combination of local and national factors; that such increases and demands were causing severe hardship to tenants of such accommodations and were uprooting long-time city residents from their communities; that recent studies establish that the acute housing shortage continues to exist; that there has been a further decline in private residential construction due to existing and proposed cuts in federal assistance to housing programs; that unless such accommodations are subjected to reasonable rent and eviction limitations, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; and that such conditions constitute a grave emergency.

Supreme Court, U.S.
FILED
JUL 26 1991
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(2)

No. 91-40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NICHOLAS E. BRUSCO,

Petitioner,

vs.

STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Supreme Court lacks jurisdiction over this matter because the petitioner failed to exhaust his State court remedies, not having moved for leave to appeal to the New York Court of Appeals after his appeal as of right was dismissed.

2. Whether the New York State Court of Appeals properly dismissed, *sua sponte*, petitioner's appeal upon the ground that there is no substantial constitutional question.

3. Whether the Appellate Division, First Department, of the Supreme Court of the State of New York properly rejected petitioner's contention that the New York Rent Stabilization laws, by limiting vacancy rent increases, constitutes a taking of property without just compensation.

4. Whether the state, in the exercise of its police power to protect the public welfare, in the face of an acute housing shortage, by regulating rents, including vacancy rents in residential dwellings in order to prevent the exaction of unjust, unreasonable and oppressive rents, has enacted a rent stabilization plan that is rationally related to a legitimate state interest.

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vs.

STATE OF NEW YORK DIVISION
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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

ADDITIONAL STATUTES INVOLVED

1. 28 U.S.C. §1257(a) [See Appendix].

2. N.Y. Civ. Prac. Law and Rules §§5601, 5602 and 5514(a) [See Appendix].

3. Rent Control Law, N.Y.C. Admin. Code, §§26-401, et seq. (McKinneys Unconsol. Laws)

4. Rent Stabilization Law, N.Y.C. Admin. Code, §§26-501, et seq. (McKinneys Unconsol. Laws)

5. Omnibus Housing Act of 1983, Chapter 403 of the N.Y. Laws of 1983.

6. Chap. 167 of the N.Y. Laws of 1991 [Appendix].

7. 1991 N.Y.C. Local Law 20 [See Appendix].

JURISDICTION

It appears that this Court lacks jurisdiction over this matter. Petitioner sought judicial review of an administrative determination which found that he had overcharged a tenant. The determination was upheld in both the New York Supreme Court and the Appellate Division of the New York Supreme Court. Petitioner then took an appeal as of right to the New York Court of Appeals. That appeal was dismissed for want of a substantial constitutional question. He did not subsequently seek discretionary review by the New York Court of Appeals after his appeal as of right was dismissed, although such relief was still available.[1] *See*, N.Y. Civ. Prac. Law and Rules §§5601, 5602 and 5514(a); T.R. Newman, *New York Appellate Practice*, p. 11-15, n. 49 (1990).

The New York Court of Appeals can dismiss an appeal as of right brought on constitutional grounds yet grant leave to appeal to consider the constitutionality of a law. For example, in *Glenn Mohawk Milk Association v. Wickham*, 21 N.Y.2d 719, 287 N.Y.S.2d 683 (1967), 24 N.Y.2d 963, 250 N.E.2d 77, 302 N.Y.S.2d 593 (decided on other grounds), *remittitur amended*, 25 N.Y.2d 887, 251 N.E.2d 143, 304 N.Y.S.2d 4 (1969), *cert. denied*, 396 U.S.1004, 90 S.Ct. 556, 24 L.Ed.2d 496 (1970), the court dismissed an appeal as of right "upon the ground that no substantial question directly involving the construction of the Constitution of this State or of the United States was raised in

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[1] It should be noted that the petitioner, though *pro se*, is an attorney.

the courts below", but nevertheless granted motions for leave to appeal and directed the parties to address the constitutionality of a section of the Agriculture and Markets Law.

Pursuant to 28 U.S.C. §1257(a), review is limited to final judgments rendered by the highest court of a State. In the case at bar, petitioner, not having sought discretionary review by the New York of Appeals after his appeal as of right was dismissed, failed to exhaust his State court remedies. Thus, the judgment for which review is sought in this Court is not a final judgment of the highest court of the State.

The circumstances in the case at bar are virtually identical to those occurring in other cases in which petitions for writs of certiorari were denied by this Court for want of jurisdiction. In *Matthews v. Huwe*, 269 U.S. 262, 46 S.Ct. 108, 70 L.Ed.266 (1925), the Ohio Supreme Court dismissed an appeal taken as of right on the ground that the record presented no constitutional question. However, because a subsequent writ of error was made, not to the Ohio Supreme Court, but to an inferior court, the petition for a writ was denied. In the case at bar, no subsequent application was made. In *Stratton v. Stratton*, 239 U.S. 55, 33 S.Ct. 26, 60 L.Ed. 142 (1915), a petition for writ was dismissed because the discretionary review of the Ohio Supreme Court was not sought. The Court noted that:

> ...the practice for years has been in the various states where discretionary power to review exists in the highest court of the state, to invoke the exercise of such discretion in order that, upon the refusal to do so, there might be no question concerning the right to review in this court.

In *Gotthilf v. Sills*, 375 U.S. 79, 84 S.Ct. 187, 11 L.Ed.2d 159 (1963), a body execution against the debtor was affirmed by the

Appellate Division of the New York Supreme Court. The debtor's motion in the New York Court of Appeals for leave to appeal, and his appeal to that Court as of right, were dismissed on the ground that the order was not final. A writ of certiorari granted by the U.S. Supreme Court was dismissed as improvidently granted because the judgment was not a judgment of the highest court of the State, as the debtor did not apply to the Appellate Division for leave to appeal upon certified questions, as required by New York law. *See also, McMaster v. Gould*, 276 U.S. 284, 48 S.Ct. 299, 72 L.Ed. 574 (1928), *Mullen v. Western Union Beef Co.*, 173 U.S. 116, 19 S.Ct. 404, 43 L.Ed. 635 (1899), *Fisher v. Perkins*, 122 U.S. 522, 7 S.Ct. 1227, 30 L.Ed. 1192 (1887).

The decision in *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 107 S.Ct. 499, 93 L.Ed.2d 449 (1986), is not contrary. In *R.J. Reynolds*, the North Carolina Supreme Court dismissed an appeal as of right for "lack of a substantial federal constitutional question." This Court entertained jurisdiction because it considered the dismissal by the North Carolina Supreme Court to be on the merits rather than for lack of jurisdiction. 479 U.S. at 138. However, in that case there appears to have been no consideration as to whether the petitioner had exhausted other jurisdictional avenues of appeal to the North Carolina Supreme Court before have come before this Court. In the case at bar, there was clearly another avenue of appeal to the highest court in the State which was not utilized by the petitioner. Having failed to do so, he did not exhaust his State court remedies. There being no final judgment of the highest court of the State, the United States Supreme Court lacks jurisdiction over the case.

STATEMENT OF THE CASE

Respondent adopts the statement of the case as presented in the opinion of the Supreme Court of the State of New York, County of New York, Helen Freedman, J., dated

September 22, 1989 (Petitioner's Appendix "C"), and asserts that the Petitioner's Statement of the Case is inaccurate in the following respect:

Petitioner is correct in stating that there are two separate systems of regulation in New York City, rent control and rent stabilization, but does not properly represent their structure. The Rent Control Law, N.Y.C. Admin. Code, §§26-401, et seq. (McKinneys Unconsol. Laws), applies generally to housing accommodations constructed prior to February 1, 1947, which have not become decontrolled by reason of a vacancy occurring after June 30, 1971. The Rent Stabilization Law, N.Y.C. Admin. Code, §§26-501, et seq. (McKinneys Unconsol. Laws), applies generally to buildings containing six or more housing accommodations constructed between February 1, 1947 and January 1, 1974, and to accommodations which were previously subject to the Rent Control Law but were decontrolled upon vacancy. With some exceptions, housing constructed after January 1, 1974, the effective date of the Emergency Tenant Protection Act, McKinneys Unconsol. Laws, §8621, et seq., are not subject to either rent control or rent stabilization. Both systems have been administered by the Respondent since April 1, 1984, pursuant to the Omnibus Housing Act of 1983, Chapter 403 of the N.Y. Laws of 1983.[2]

Under the rent control system, rents can only be increased pursuant to approval of the rent agency upon application by the landlord. The Maximum Base Rent program permits rent increases of up to 7.5 percent annually, provided that a landlord meets various statutory and regulatory criteria. In addition to the increases allowed under the Maximum Base Rent program, rent increases may be granted for such items as major capital improvements or hardship.

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[2] The Respondent also administers two parallel rent regulatory systems in localities outside New York City.

Tenants in rent controlled apartments are considered to be statutory tenants whose tenancies are protected without the need for leases. Rent increases are not dependent on the existence of leases. Upon vacancy decontrol, a housing accommodation is no longer subject to the rent limits of the Rent Control Law.

Under the rent stabilization system, tenants are given the option of one or two year renewal leases. Rent increases other than for such items as major capital improvements or hardship, can only occur upon a lease renewal. The allowable city-wide rent increases are established annually by the Rent Guidelines Board, after the preparation of a study and public hearings. In setting allowable lease renewal rent increases, the Board is required to consider the economic condition of the real estate industry, including factors such as real estate taxes, sewer and water rates, operating maintenance costs, costs and availability of financing, over-all supply of housing accommodations and vacancy rates, cost of living indices, and such other data as may be available and relevant. *See*, N.Y.C. Admin. Code §26-510(b). The Rent Guidelines Board is also empowered to determine what rent increases are allowable for a vacancy rental. *See*, N.Y.C. Admin. Code §26-510(d).

Petitioner incorrectly states that the vacancy rent for an apartment already rent stabilized is limited to the rent charged to the prior tenant plus the applicable vacancy increase in effect at the time. (Pet. 7) In fact, an owner is generally allowed both the lease renewal increase in effect at the time, and the vacancy increase then in effect.

The allowable vacancy increases set by the Rent Guidelines Board do not apply to the initial rent of an apartment first becoming subject to the Rent Stabilization Law upon a rental after vacancy decontrol. A landlord may rent to the first rent stabilized tenant at a market rent, subject to the tenant's filing a Fair Market Rent Appeal within ninety days of

receiving proper notice from the landlord. If the tenant files a Fair Market Rent Appeal the rent agency establishes the initial rent stabilized rent on the basis of a combination of comparable rents provided by the landlord and a special guideline set by the Rent Guidelines Board. *See*, N.Y.C. Admin. Code §26-513.

REASONS FOR DENYING THE WRIT

The New York Court of Appeals properly dismissed petitioner's appeal *sua sponte* on the ground that no substantial constitutional question is directly involved. The imposition of limitations on vacancy rents under the rent stabilization program in New York City and New York State is nothing more than a standard form of rent regulation which has long been upheld as constitutional.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), this Court expressly declared that States have broad power to regulate landlord-tenant relationships. The Court, while finding a New York statute which required a landlord to permit cable television installations to constitute a taking under the physical occupation rule, nevertheless stated:

> Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.

458 U.S. 419 at 440.

Through the years, federal, state and local governments have, in response to significant housing shortages, enacted legislation declaring the existence of a serious public emergency and restricting the ability of landlords to raise rents and evict tenants. Both this Court and the New York Court of Appeals have consistently upheld these restrictions and rejected claims that such measures were constitutionally infirm. See, e.g., *Bowles v. Willingham*, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944); *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988); *Teeval Co. v. Stern*, 301 N.Y. 346 (1950), *cert. denied*, 340 U.S. 876, 71 S.Ct. 124, 95 L.Ed. 637; *8200 Realty Corp. v. Lindsay*, 27 N.Y.2d 124, 313 NYS2d 733, *appeal dismissed*, 400 U.S. 962 (1970); *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 409 N.E.2d 948, 431 N.Y.S.2d 475 (1980), *appeal dismissed, sub nom., Benson Realty Corp. v. Koch*, 449 U.S. 1119, 67 L.Ed.2d 106, 101 S.Ct. 933.

In *Pennell v. City of San Jose*, *supra*, a rent control provision which allows consideration of the tenant's hardship in fixing a reasonable rent was found to be constitutional. This Court reiterated the constitutionality of government intervention in the marketplace to regulate rates and prices where there is a discrepancy between supply and demand, or where they are artificially inflated as a result of the existence of a monopoly or near monopoly, 485 U.S. 1 at 11. The Court further noted that rent laws are not per se takings:

> And in *FCC v. Florida Power Corp.*, 480 US 245, 94 L. Ed 2d 282, 107 SCt 1107 (1987), we stated that "statutes regulating the economic relations of landlords and tenants are not per se takings." Id., at 252, 94 L Ed 2d 282, 107 S ct 1107. Despite amici's urgings, we see no need to reconsider the constitutionality of rent control per se.

485 U.S. 1 at 12, n. 6.

The long line of cases upholding the constitutionality of rent regulation has not drawn any distinction between limitations on vacancy rents and limits on rent increases for tenants in occupancy. Indeed, it is apparent that many of those cases have implicitly, if not explicitly, approved of limitations on vacancy rents. For example in, *Bowles v. Willingham*, 321 US 503, 64 S.Ct. 641, 99 L.Ed. 892 (1944), this Court found constitutional the establishment of maximum rents under the Federal wartime price regulation program, including rents in accommodations rented after a certain date. In *Teeval v. Co. v. Stern*, 301 N.Y. 346, 93 N.E.2d 884 (1950), *cert. denied*, 340 U.S. 876, 71 S.Ct. 124, 95 L.Ed. 637, the New York State rent control law, which not only froze rents, including vacancy rents, but rolled rents back to those in effect on an earlier date, was upheld as constitutional. And in *I.L.F.Y. Co. v. Temporary State Housing Rent Commission*, 10 N.Y.2d 263, 219 N.Y.S.2d 249 (1961), *app. dismd.*, 369 U.S. 795, the court affirmed the constitutionality of the setting of maximum rents under New York's rent control laws.

In the case at bar, petitioner's challenge to the constitutionality of limits on vacancy rents rests solely on the claim that these limits do not advance a legitimate state interest. This claim is completely unfounded.

A law or regulation will not be held to effect a regulatory taking so long as (1) it is "reasonably necessary to the effectuation of a substantial government purpose", or it "substantially advances legitimate state interests", and (2) does not "deny an owner economically viable use of his land." *See, Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 at 485, 107 S.Ct. 1232 at 1241, 94 L.Ed.2d 472 (1987); *Agins v. Tiburon*, 447 U.S. 255 at 260, 100 S.Ct. 2138 at 2141, 65 L.Ed.2d (1980); *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 at 127, 98 S.Ct. 2646 at 2660 (1978). Both factors have been interpreted in a manner which gives great deference to governmental action. This Court has

stated that "a broad range of governmental purposes and regulations satisfies" the state interest requirement. See, *Nollan v. California Coastal Commission*, 483 U.S. 825 at 835, 107 S.Ct. 3141 at 3147, 97 L.Ed.2d 677 (1987). Landlord-tenant relations have been particularly singled out as a field in which great deference is accorded to governmental regulation. *See, Loretto v. Teleprompter Manhattan CATV Corp., supra*, 458 U.S. at 440; *Pennell v. City of San Jose, supra*, 485 U.S. at 12, n.6.

In *Pennell v. City of San Jose, supra*, 485 U.S. at 12, 13, 14, n.8, this Court identified the "preven[tion of] excessive and unreasonable rent increases" and the "protection of consumer welfare" by limiting rents and "reducing the costs of dislocation" as legitimate public purposes.

The legislative findings contained in §8622 of the Emergency Tenant Protection Act of 1974, McKinneys Uncon-sol. Laws, clearly enunciate a legitimate purpose underlying the regulation of rents, including vacancy rents. The findings state in relevant part:

> The legislature hereby finds and declares that a serious public emergency continues to exist in the housing of a considerable number of persons in the state of New York which emergency was at its inception created by war, the effects of war and the aftermath of hostilities, that such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents; that there continues to exist in many areas of the state an acute shortage of housing accommodations caused by continued high demand...; that a substantial number of persons residing in housing not presently subject to the provisions of the emergency housing rent

> control law or the local emergency housing rent control act are being charged excessive and unwarranted rents and rent increases; that preventive action by the legislature continues to be imperative in order to prevent exaction of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the health, safety and general welfare...

The prevention of "unjust, unreasonable and oppressive rents and rental agreements" is plainly a legitimate state purpose, and the imposition of limits on rents, including vacancy rents, is an obvious means of advancing that legitimate purpose.

Petitioner concedes that the limitation of rents for tenants in occupancy, both before and after a vacancy, are constitutional, but fails to show how vacancy rents might be constitutionally distinguishable. His assertions about apartment warehousing and broker's fees are nothing more than self-serving statements about complex phenomena which have not been tested in this litigation, and which are not determinative of the constitutional question.

The reasonableness of the legislative choice is not determined by whether or not the choice was the best or most suitable available. Nor is it necessary to show that the method chosen invariably produces the ideal result for all tenants or all landlords in all cases. The place for determining the weight and significance of the many elements to be considered is the legislature, not the judiciary. *See, e.g., East New York Savings Bank v. Hahn*, 326 U.S.230, 234, 66 S.Ct. 69, 90 L.Ed.34 (1945). In any event, the regulatory limitations on rents, whether for vacant or occupied apartments, have a rational basis and prescribe a reasonable method. It is incomprehensible that

rent regulation as a whole is constitutional but that limits on vacancy rent increases are not.

Moreover, the fact that the rent regulation system grew out of the wartime emergency of the 1940s does not nullify its presently legitimate purpose as found by the State Legislature. In accordance with the requirements of the statutory scheme, the New York State legislature and New York City Council, every two to three years, have given renewed consideration to the continued need for rent regulation by reason of the extreme shortage of housing, and have extended the period of rent stabilization only after housing surveys, public hearings, and other legislative consideration. The most recent extension occurred earlier this year; statewide legislation having been extended to June 15, 1993, by virtue of Chapter 167 of the N.Y. Laws of 1991; and rent stabilization in New York City extended to April 1, 1994, by virtue of the N.Y.C. Local Law 20 of 1991.

In *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 409 N.E.2d 948, 431 N.Y.S.2d 475 (1980), *appeal dismissed, sub nom., Benson Realty Corp. v. Koch*, 449 U.S. 1119, 67 L.Ed.2d 106, 101 S.Ct. 933, the New York Court of Appeals, noting that New York's rent laws are subject to periodic re-examination, found as follows:

> Plaintiffs attack the New York City Rent Control Law on the grounds that there is no longer an emergency after 36 years, that as applied it is confiscatory, and that in any event there has been such a failure of administration of law as to mandate is being declared unconstitutional. The need for rent control has been re-examined legislatively at intervals of three years, the most recent such review being the March 27, 1980 Report of the New York State Temporary Commission on Rental Housing, which conclud-

> ed that "There is a need for continuing a form of rent regulation in those jurisdictions in which housing accommodations are presently subject to rent control or rent stabilization." Whether there is need for controls is matter for legislative determination in the first instance. The presumption of a factual basis for that determination is not overcome by mere passage of time, nor have plaintiffs, whose affidavits concentrate on the effect of controls on property owners, presented evidence to demonstrate beyond a reasonable doubt that there is no factual basis.

Nothing has been shown by petitioner to warrant a re-examination of well settled principles. Petitioner has not raised a substantial constitutional question. He has not shown, and indeed cannot show, that the Rent Stabilization Law as applied to limiting vacancy rents is unconstitutional. Because the courts below correctly found that limits on vacancy rents are constitutional, the petition should be denied.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Dated: New York, New York
July 25, 1991

Respectfully submitted,

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APPENDIX

28 U.S.C. §1257 provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty of statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

New York Civil Practice Law and Rules
§5601. Appeals to the court of appeals as of right

(a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right: 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and 2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon nonfinal determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, from a final determination of an administrative agency or from a final arbitration award, or from an order of

the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment, determination or award and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

New York Civil Practice Law and Rules
§5602. Appeals to the court of appeals by permission

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. Permission by an appellate division for leave to appeal shall be pursuant to rules authorized by that appellate division. Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. Such appeal may be taken:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, an administrative agency or an arbitration,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court, final determination of such agency or final arbitration award where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment, determination or award and the final judgment, determination or award is not appealable as of right pursuant to subdivision (d) of section 5601 of this article; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

New York Civil Practice Law and Rules

§5514. Extension of time to take appeal or to move for permission to appeal

(a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

(b) Disability of attorney. If the attorney for an aggrieved party dies, is removed or suspended, or becomes physically or mentally incapacitated or otherwise disabled before the expiration of the time limited for taking an appeal or moving for permission to appeal without having done so, such appeal may be taken or such motion for permission to appeal may be served within sixty days from the date of death, removal or suspension, or commencement of such incapacity or disability.

(c) Other extensions of time; substitutions or omissions. No extension of time shall be granted for taking an appeal or for moving for permission to appeal except as provided in this section, section 1022, or section 5520.

Chapter 167 of the New York Laws of 1991, §§1-3.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 17 of chapter 576 of the laws of 1974, amending the emergency housing rent control law relating to the control of and stabilization of rent in certain cases, as amended by chapter 144 of the laws of 1989, is amended to read as follows:

§ 17. Effective date. This act shall take effect immediately and shall remain in full force and effect until and including the fifteenth day of June, [1991] *1993*, except that sections two and three shall take effect with respect to any city having a population of one million or more and section one shall take effect with respect to any other city, or any town or village whenever the local legislative body of a city, town or village determines the existence of a public emergency pursuant to section 3 of the emergency tenant protection act of nineteen seventy-four, as enacted by section four of this act, and provided that the housing accommodations subject on the effective date of this act to stabilization pursuant to the New York City rent stabilization law of nineteen hundred sixty-nine shall remain subject to such law upon the expiration of this act.

Section 2. Section 2 of chapter 329 of the laws of 1963, amending the emergency housing rent control law relating to the recontrol of rents in certain cases, as amended by chapter 144 of the laws of 1989, is amended to read as follows:

§ 2. This act shall take effect immediately and the provisions of subdivision 6 of section 12 of the emergency housing rent control law, as added by this act, shall remain in full force and effect until and including June 15, [1991] *1993*.

Section 3. Subdivision 2 of section 1 of chapter 274 of

the laws of 1946, constituting the emergency housing rent control law, as amended by chapter 144 of the laws of 1989, is amended to read as follows:

§ 2. The provisions of this act, and all regulations, orders and requirements thereunder shall remain in full force and effect until and including June 15, [1991] *1993*.

LOCAL LAWS
OF
THE CITY OF NEW YORK
FOR THE YEAR 1991

No. 20

To amend the administrative code of the City of New York, in relation to continuing the stabilization of rents in certain housing accommodations.

Be it enacted by the Council as follows:

Section 1. Section 26-502 of the administrative code of the City of New York, as amended by local law number 18 for the year 1988, is amended to read as follows:

§ 26-502. Additional findings and declaration of emergency. The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the City of New York and will continue to exist after April first, nineteen hundred [eighty-eight] *ninety-one* and hereby reaffirms and repromulgates the findings and declaration set forth in section 26-501 of this title.

§ 2. Section 26-520 of such code, as amended by local law number 18 for the year 1988, is amended to read as follows:

§ 26-520 Expiration date. This chapter shall expire on April first, nineteen hundred [ninety-one] *ninety-four* unless rent control shall sooner terminate as provided in subdivision three of section one of the local emergency housing rent control law.

§ 3. This local law shall take effect immediately.

(3)

Number 91 - 40

Supreme Court, U.S.
FILED
SEP 25 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

NICHOLAS E. BRUSCO,

Petitioner ,

vs.

STATE OF NEW YORK
DIVISION OF HOUSING & COMMUNITY RENEWAL,

Respondent .

PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

NICHOLAS E. BRUSCO,

Petitioner,

vs.

STATE OF NEW YORK
DIVISION OF HOUSING & COMMUNITY RENEWAL,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ADDITIONAL STATUTORY PROVISIONS AND RULES INVOLVED[1]

1. 28 U.S.C. § 1257(a).

2. N.Y. Civ. P. & Rules, 5601 and 5602

[1] These additional statutory provisions and rules appear in Appendix H hereto.

JURISDICTION

The judgment of the New York Court of Appeals dated April 4, 1991, dismissing petitioner's appeal for lack of substantial constitutional question is a final judgment of New York's highest court within the meaning of 28 U.S.C. § 1257(a). Thus, petitioner's writ for certiorari is properly before this Court.

The New York Court of Appeals is the highest court of the State of New York. Pursuant to New York Law, appeals from the Appellate Division to the New York Court of Appeals may be made as of right[2] or upon leave.[3] Petitioner took his appeal as of right, pursuant to CPLR 5601(b)(1), arguing only the constitutional question. The Court of Appeals dismissed the appeal, sua sponte, for lack of substantial constitutional question.[4]

Respondent argues, in sum, that because petitioner did not make both an appeal as of right and a discretionary appeal, he did not exhaust his remedies and the New York Court of Appeals judgment is not final within the meaning of 28 U.S.C. § 1257(a). The cases of this Court, including those cited by respondent, hold otherwise.

Further, contrary to respondent's view and pursuant to New York law, it is not clear that a discretionary appeal lies concurrently with an as of right appeal. CPLR 5602(a)(1)(i) allows an appellant to seek discretionary review by the court of appeals "from an order of the appellate division which finally determines the action and which is not appealable as of right. ..." (emphasis added). Therefore, it follows that where an appeal does lie as of right, there is no provision for a discretionary appeal. Glenn Mohawk Milk Assoc., Inc. v. Wickham,[5] is not

[2] New York Civ. P. Law & Rules 5601.

[3] New York Civ. P. Law & Rules 5602.

[4] The opinion of the New York Court of Appeals is appended hereto as Appendix I.

contradictory. In Glenn Mohawk, appellant took both an appeal as of right on constitutional grounds, and a discretionary appeal, on constitutional and other grounds, to the New York Court of Appeals. The court of appeals dismissed the as of right appeal because "no substantial question directly involving the construction of the Constitution of this State or of the United States was raised in the courts below and, therefore, no appeal lies as of right." [6] The case was dismissed not on the merits, but because the appellant had no appeal as of right.

The other cases cited by respondent do not support its contention that a New York litigant must file both a discretionary and an appeal as of right on a constitutional question to achieve finality within the meaning of 28 U.S.C. § 1257(a).

In Fisher v. Perkins,[7] the petitioner sought a writ of certiorari to the judgment of the Superior Court of the State of Kentucky. This Court denied jurisdiction because the Superior Court was not Kentucky's highest court and the petitioner had not made any application to the high court. In this regard the Court stated:

> This court has no power to review any other judgments of the courts of a State than those of the highest court "in which a decision in the suit could be had." Sec. 709, Rev. Stat. The court of appeals is the highest court of the State of Kentucky, and consequently, until it has been made to appear affirmatively on the face of the record

[5] 28 A.D.2d 764, 280 N.Y.S.2d 839 (3d Dept. 1967), *app. dism'd,* 21 N.Y.2d 719, 287 N.Y.S.2d 682 (1967), *aff'd,* 24 N.Y.2d 963, 302 N.Y.S.2d 593 (1969), *remittitur amended,* 25 N.Y.2d 887, 304 N.Y.S.2d 4 (1969), *cert. denied,* 396 U.S. 1004, 24 L.Ed.2d 496 (1970).

[6] Glen Mohawk, 21 N.Y.2d 719 at 720.

[7] Fisher, 122 U.S. 522, 30 L.Ed. 1192 (1887)

> that a decision in this could not have been had in that court, we are not authorized to review the judgment of the Superior Court.[8]

In Mullen v. Western Beef Co.,[9] the petitioner sought a writ of certiorari to Colorado's Court of Appeals, an intermediate appellate court. Pursuant to Colorado law, appeals on constitutional questions were as of right to the supreme court, Colorado's highest court. The petitioner did not appeal its constitutional question to the Colorado Supreme Court, and this Court denied the petition for a writ of certiorari stating:

> And although the Supreme Court might have applied the rule that where a judgment rests on grounds not involving a constitutional question it will not interfere, we cannot assume that that court would not have taken jurisdiction, since it has not so decided in this case, nor had any opportunity to do so.
>
> We must decline to hold that it affirmatively appears from the record that a decision could not have been had in the highest court of the State, and this being so, the writ of error cannot be sustained.[10]

Likewise, in Stratton v. Stratton,[11] the petitioner appealed to this Court from a judgment of an intermediate Ohio appellate court without having made application to Ohio's high court, the supreme court. This Court dismissed for want of

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[8] Fisher, 122 U.S. at 525, 30 L.Ed. at 1192-93.

[9] 173 U.S. 116, 42 L.Ed. 635 (1899).

[10] Mullen, 173 U.S. at 123, 43 L.Ed. at 637.

[11] 239 U.S. 55, 60 L.Ed. 142 (1915).

jurisdiction stating:

> True, it is urged that under Ohio law the jurisdiction of the supreme court was not imperative, but gracious or discretionary, that is, depending upon its judgment as to whether the case was one of public or great general interest, --an exceptional class in which the case before us, it is insisted, we must now decide was not embraced. But this simply invites us to assume jurisdiction by exercising an authority which we have not; that is, by indulging in conjecture as to what would or would not have been the judgment of the supreme court of Ohio if it had been called upon to exert the discretion vested in it by state laws.[12]

In the above cases, unlike the case at bar, the petitioner made no appeal whatsoever to the state high court before petitioning this Court for a writ of certiorari. Thus, the writs were denied because the orders appealed from were not final.

The case of McMaster v. Gould,[13] did not involve a constitutional issue, and pursuant to New York law, the appellant did not have any appeal as of right to New York's highest court. There is no question that an appeal to the New York Court of Appeals which is not a matter of right, taken without leave, must be dismissed.[14] Despite the appellate division's denial of the

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[12] Stratton, 239 U.S. at 56, 60 L.Ed. at 143.

[13] 276 U.S. 284, 72 L.Ed. 574 (1928).

[14] People v. Trimarchi, 231 N.Y. 263, 268, 131 N.E. 910 (1921); Pillsbury Flour Mills Co. v. Nicotera, 234 N.Y. 534, 138 N.E. 436 (1922); Re Schmidt, 236 N.Y. 645, 646, 142 N.E. 318 (1923); Donovan v. Cunard S.S. Co. 236 N.Y. 651, 142 N.E. 320, *reh'g denied,* 237 N.Y. 524, 143 N.E. 728 (1923); Johnson v. Whaley, 239 N.Y. 570, 571 147 N.E. 200

appellant's application for permission to appeal to the New York Court of Appeals, the appellant appealed directly to the New York Court of Appeals. The appellant did not make an application for leave, nor did he have an appeal as of right. The court of appeals dismissed the appeal without opinion.[15] This Court dismissed the writ for lack of jurisdiction stating:

> And since the petitioners, when the Appellate Division refused them leave to appeal, did not make an application to the court of appeals for leave, the judgment is not that of the highest court of the state in which a decision could be had.[16]

Further, the petitioner in McMaster did not dispute that the decision of the appellate division appealed from did not finally and completely dispose of the entire action.

The case of Gotthilf v. Sills[17] does not support respondent's proposition. In Gotthilf, the New York Court of Appeals dismissed both the appellant's discretionary motion for leave to appeal and his motion for an as of right appeal on the sole ground that "the order sought to be appealed from [did] not finally determine the action within the meaning of the Constitution."[18] Thus, as a matter of New York State law, the court of appeals dismissed the appeal because under New York law[19] an appeal on such a non-final order is only allowed by leave of the appellate division. The dismissal by the Court of Appeals was not on the merits, but for lack of jurisdiction on the

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(1924).

[15] 242 N.Y. 604, 152 N.E. 446 (1926).

[16] McMaster, 276 U.S. at 286-87, 72 L.Ed. at 575.

[17] Gotthilf v. Sills, 375 U.S. 79, 11 L.Ed 2d 159 (1963).

[18] Gotthilf v. Sills, 12 N.Y.2d 761 (1962).

[19] Civil Practice Act, § 589.

ground that the order appealed from did not finally resolve the entire dispute between the parties, and therefore, the case was not properly before the court of appeals. This Court dismissed the writ for certiorari as improvidently granted, because the "judgment of the Appellate Division [was] not that of the 'highest court of a State in which a decision could be had' within the meaning of 28 USC § 1257."[20]

In Matthews v. Huwe,[21] the high court of the State of Ohio, the supreme court, dismissed the constitutional appeal because the issue was not properly raised below so as to preserve appellate review.[22] The appellant sought a writ of certiorari, not to the supreme court decision, but to the intermediate appellate court decision, the Ohio Court of Appeals. This Court denied the writ because it perceived the Ohio Supreme Court's decision as a dismissal on jurisdictional grounds, and not on the merits. Distinguishing Matthews from Hetrick v. Lindsey,[23] Western Union Telegraph Co. v. Crovo[24] and Norfolk & S. Turnp. Co. v. Virginia,[25] this Court denied the writ stating:

> We think, however, that in [Western Union and Norfolk] as in the Hetrick Case, on the face of the record the state supreme court did pass on the merits of the case by holding that the questions involving the Constitution of the United States, and being the only ground for a writ of error from this court, were not debatable. It is one of those not infrequent cases in which the decision on the merits of

[20] Gotthilf, 375 U.S. at 80, 11 L.Ed.2d at 161.

[21] 269 U.S. 262, 70 L.Ed. 266 (1925).

[22] Matthews, 269 U.S. at 263, 70 L.Ed. at 267.

[23] 265 U.S. 384, 68 L.Ed. 1065 (1924).

[24] 220 U.S. 364, 55 L.Ed. 498 (1911).

[25] 225 U.S. 264, 56 L.Ed. 1082 (1912).

> the case also determines jurisdiction. The petition was dismissed, not because the court was really without jurisdiction, for it could have taken it, but because the question was regarded as frivolous, which is a different thing from finding that the petition was not in character one which the court could consider.[26]

In Hetrick, the Ohio high court had dismissed the appellant's appeal as of right because the statute under constitutional attack had been in effect for so long that the state court would no longer question its constitutional validity. This Court granted the writ of error because the dismissal was one on the merits.

In Norfolk and Western Union, the appellants sought writs of certiorari from the inferior Virginia State court because the high court summarily dismissed the appeals. In perceiving those dismissals as on the merits, rather than for jurisdictional reasons, this Court allowed the writs.

Thus, in Matthews, this Court denied the writ because petitioner had not properly preserved its constitutional claim in the state courts. The decision of the Ohio Supreme Court dismissing the appeal was not on the merits, but because the issue had not been preserved for appellate review. Under such circumstances, petitioner could not then obtain the writ of certiorari to a lower court decision as a final decision. That part of Matthews upon which respondent relies herein is dicta. Insofar as Matthews supports respondent's position it has been subsequently overruled in Minneapolis, S.P. & S.S.M.R. Co. v. Rock,[27] Chesapeake & O.R. Co. v. Mihas [28] and most recently in R.J.

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[26] Matthews, 269 U.S. at 265, 70 L.Ed. at 267-68.

[27] 279 U.S. 410, 73 L.Ed. 766 (1929)

[28] 280 U.S. 102, 74 L.Ed. 207 (1929).

Reynolds Tobacco Co. v. Durham County[29] In both Minneapolis and Chesapeake, this Court held that where there are two avenues to the high court of the state, for purposes of 28 U.S.C. § 1257(a), it is enough that a litigant pursue one in getting to that court.

R.J. Reynolds squarely supports this Court's jurisdiction herein. Under North Carolina State law, appeal to the highest court, the Supreme Court, could be had by discretion or insistence, on a constitutional question. Reynolds, the petitioner, had made a petition for discretionary review to the N.C. Supreme Court. Upon motion of Durham County, the court dismissed the appeal for lack of substantial constitutional question. Reynolds then appealed to this Court, wherein Durham objected to jurisdiction pursuant to 28 U.S.C. § 1257(a) because Reynolds had not also made a timely "insistent" appeal, or, appeal as of right. This Court found the argument unpersuasive, considered the N.C. Supreme Court's dismissal for lack of substantiality as one on the merits, and granted the writ for certiorari stating:

> [A] state statute is sustained within the meaning of sec. 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds.[30]

This Court held further that :

> [T]here [was] no question that the North Carolina Supreme Court had jurisdiction to hear Reynolds' appeal, but it determined not

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[29] 479 U.S. 130, 93 L.Ed.2d 449 (1986)

[30] R.J. Reynolds, 479 U.S. at 137, 93 L.Ed.2d at 460 (*citing*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 60 L.Ed.2d 336, 99 S. Ct. 1813 (1979)).

> to do so in light of its conclusion that the appeal raised no substantial constitutional question.[31]

These are the facts of the case at bar. The constitutional question was put squarely before the New York Court of Appeals which dismissed for lack of substantial constitutional question. The Court of Appeals had jurisdiction to hear the appeal, but determined not to hear it. This is a decision on the merits by the highest court of the State of New York.

The test is whether the highest court of the state, in which a decision could be had, has passed on the merits of the question presented. If the case were not properly brought before the highest court of the state, then the question is not passed upon, rather the state court may dismiss the appeal for state law jurisdictional reasons, rendering a petition for review to this Court improper as the decision appealed from is non-final. Such was the case in Glenn Mohawk, McMaster, and Matthews. The test is not whether the decision appealed from is one of the highest court in the state because the applicable state law may not allow the appellant any appeal to the state's highest court. Thus, in Norfolk and Western Union, writs of certiorari to inferior state court decisions were granted. The test is whether the question was passed upon by the the highest state court in which a decision could have been had.

The New York Court of Appeals may dismiss a constitutional appeal as of right for lack of substantial constitutional question. This doctrine may be likened to that of stare decisis in that a constitutional appeal will be dismissed for lack of substantiality when the question has been previously decided,[32] or is "utterly lacking in merit."[33] It has been stated

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[31] R.J. Reynolds, 479 U.S. at 138, 93 L.Ed.2d at 461.

[32] Gerzof v. Gulotta, 40 N.Y.2d 825, 387 N.Y.S.2d 568, 355 N.E.2d 797 (1976); Matter of Pulp Sales Corp. v. Orange Pulp & Paper Mills, 288 N.Y.

that the substantiality of question requirement is designed to give the court a means of coping with cases where the mere ingenuity of counsel could be used in fashioning a constitutional question which is otherwise not appealable as of right.[34] Newman also states that :

> The [New York Court of Appeals'] power to find the constitutional question sought to be raised not substantial enables it to dismiss appeals taken as of right in those cases where it would have denied leave to appeal had the appellant sought permission.[35]

In the case at bar, petitioner has raised the Fifth Amendment Takings violation at the administrative level, to the trial court, the appellate division, and ultimately to the court of appeals as the only question presented. Petitioner's constitutional question was before New York's highest court, which necessarily passed on the question in finding that there was no substantial constitutional question. This is a decision on the merits by New York State's highest court. This petition for a writ of certiorari is properly before this Court.

505, 41 N.E.2d 924 (1942); Cohen & Karger, The Powers of the New York Court of Appeals, (1952) § 55, p. 254.

[33] Cohen & Karger, § 55, pp. 252-55.

[34] Newman, Thomas R., New York Appellate Practice (1991) § 11.01[2][iii].

[35] Id.

ADDITIONAL REASONS WHY THE WRIT SHOULD BE GRANTED

POINT I Respondent Employs An Incorrect Standard In Measuring Petitioner's Claim

This Court's standard for Fifth Amendment Taking of property is whether a regulation, which impairs an owner's property rights and would otherwise be violative of the Takings clause, substantially advances a legitimate state interest, or, denies an owner economically viable use of property.[36] Respondent has both miscited and misquoted[37] this Court's Takings test as set forth in Keystone,[38] Agins[39] and Penn Central[40] by stating that this Court requires both.

Furthermore, respondent tries to lower the constitutional standard by reducing it to the mere finding of rational basis where it is required to show substantial advancement.

POINT II Respondent Has Demonstrated No Connection Between the Challenged Provisions and Their Putative Purpose

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[36] Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-41, 97 L.Ed.2d 677, 687-92 (1987); Agins v. Tiburon, 447 U.S. 255, 260, 65 L.Ed.2d 106, 112 (1980); Penn Central Transportation Co. v. New York City Landmarks Preservation, 438 U.S. 104, 138, 57 L.Ed.2d 631, 657 (1978).

[37] Respondent's Brief in Opposition, p. 9.

[38] Keystone Bituminous Coal Assoc. v. De Benedictus, 480 U.S. 470, 485, 94 L.Ed.2d 472, 488 (1987)

[39] Agins, 447 U.S. at 260, 65 L.Ed.2d at 112.

[40] Penn Central, 438 U.S. at 127, 57 L.Ed.2d at 648.

Respondent has simply concluded that it is "obvious" that the challenged provisions fulfill a "plainly" legitimate state purpose.[41] This Court requires that in order to satisfy the constitutional test, respondent must show a close nexus between the burdens imposed on the property owner by the regulation and the alleviation of the problem it seeks to relieve.[42] Further, the obligations imposed on owners by the regulation may not be of the type that should be borne by the public as a whole.[43]

The record shows that the challenged provisions actually run counter to any legitimate state interest by providing incentive for owners to warehouse rent stabilized units, hindering the supply of newly constructed rental housing, fostering undermaintenance of existing rental housing and transferring the value of vacant below-market rent stabilized units to others. Respondent states that these are self-serving statements[44] and involve "complex phenomena which have not been tested in this litigation." The evidence in the record includes studies commissioned by the City of New York[45], and petitioner agrees that the evidence has not been tested in this litigation. This Court must resolve these issues in order to answer the constitutional question before it, and thus the writ should be granted.

New York's rent regulation grew out of wartime emergency. Respondent relies upon thirty years of rubber stamping by the New York State legislature and courts of rent regulation for the proposition that it is incomprehensible for this Court to find unconstitutional the challenged vacancy increase limitations. Petitioner's claim relates only to the vacancy increase

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[41] Respondent's Brief, p. 11.

[42] Nollan, 483 U.S. at 834-41, 97 L.Ed.2d at 687-92.

[43] Armstrong v. United States, 364 U.S. 40, 49, 4 L.Ed.2d 1554, 1561 (1960).

[44] Respondent's Brief, p. 11.

[45] New York City Housing & Vacancy Report, 1987, Stegman, Michael A.

portion of Rent Stabilization Law. It is not even clear from the legislative findings whether limitations on vacant apartments were contemplated as a part of the rent regulatory scheme, which was designed primarily to protect tenants in occupancy.

This Court need not find, nor does petitioner submit, that the rent control laws as a whole are unconstitutional. The Rent Stabilization Laws regulate tenants in occupancy as well as vacant apartments by guaranteeing renewal leases at prescribed rates. This part of the Rent Stabilization Law may advance the legitimate state interest of preventing the displacement of tenants in occupancy. The challenged provisions only apply to vacant apartments and, therefore, there is no tenant in occupancy to protect. This Court can clearly find that the challenged provisions are unconstitutional, without having to invalidate the rent control laws as a whole.

CONCLUSION

In sum, this petition is properly before this Court. The challenged provisions do not substantially advance any of their putative purposes as enumerated in the legislative findings. Respondent's overcharge order seeks to take petitioner's property without compensation in violation of the Fifth Amendment. Respondent has not shown how the challenged provisions advance any public purpose, whereas petitioner has shown that the challenged provisions do not substantially advance, and, in fact, run counter to, any legitimate state interest. If this Court determines that the challenged provisions are invalid, tenants in occupancy will not be affected. Petitioner has exhausted his state court remedies without the review mandated by this Court.

For these further reasons, the writ should be granted.

Dated: New York, New York
September 25, 1991

Respectfully submitted,

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APPENDIX H

28 U.S.C. § 1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised uner, the United States.

New York Civil Practice Law and Rules

Section 5601. Appeals to the court of appeals as of right.

(a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original

instances which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing , upon stipulation for a judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon nonfinal determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, from a final determination of an administrative agency or from a final arbitration award, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment, determination or award and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

Section 5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division, granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. Permission by an appellate division for leave to appeal shall be pursuant to rules

authorized by that appellate division. Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave be granted upon the approval of two judges of the court of appeals. Such appeal may be taken:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, an administrative agency or an arbitration,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court, final determination of such agency or final arbitration award where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment, determination or award and the final judgment, determination or award is not appealable as of right pursuant to subdivision (d) of section 5601 of this article; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of

paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency.

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

APPENDIX I

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourth day of April A.D. 1991

Present, HON SOL WACHLER,
Chief Judge, presiding.

Mo. No. 378 SSD 27

In the Matter of Nicholas E. Brusco,

Appellant,

v.

New York State Division of
Housing & Community Renewal,

Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Judge Titone took no part.

Donald M. Sheraw
Clerk of the Court